REPORTS

OF

CASES

ARGUED AND RULED

AT

Nisi Prius,

IN

THE COURTS OF KING'S BENCH

AND

COMMON PLEAS,

FROM EASTER TERM, 43 GEO. III. 1803,
TO MICHAELMAS TERM, 46 GEO. III. 1806,
BOTH INCLUSIVE.

BY ISAAC ESPINASSE,

OF GRAY'S INN, ESQ., BARRISTER AT LAW.

VOL. V.

LONDON:

PRINTED FOR JOSEPH BUTTERWORTH AND SON,
LAW-BOOKSELLERS, 43, FLEET-STREET;
AND JOHN COOKE, ORMOND QUAY, DUBLIN.

1807.

PRINTED BY J. AND T. CLARKE, ST. JOHN-SQUARE, LONDON.

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CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN

EASTER TERM, 43 GEO. III.

COTTENHAM PUBLIC LIBRARY 1859

FIRST SITTING IN TERM AT GUILDHALL.

SPURRIER *against* ELDERTON, one, &c.

THIS was an action of *assumpsit* for money paid, laid out, and expended, with the usual money counts.

Plea of *Non-assumpsit*.

The plaintiff in the action was an auctioneer; and the action was brought to recover from the defendant the sum of 75*l.* under the following circumstances:—The defendant had employed the plaintiff to sell an estate. The plaintiff accordingly put it up to sale, and it was knocked down to a purchaser; but after it had been so sold, it was objected to by the purchaser, on the grounds of a defect in the title. The defendant insisted that it was a good title; and that the buyer should complete his purchase. Upon which an action was brought by the purchaser, who refused to complete *his purchase, to recover back the deposit against the auctioneer, the plaintiff in this cause.

When the action was commenced against *Spurrier*, the plaintiff, he gave notice of it to the defendant; and required him to defend the action. The defendant *Elderton*, declined to do it. Upon which the plaintiff paid back the money he had received as a deposit, without further contest; and also the costs of the action, and those of his own attorney, together with the excise duty charged on the sale, and interest on it from the time of the sale:

Where an auctioneer has sold an estate, the title of which being objected to, and he refusing to return the deposit, an action is brought, in which he afterwards pays the costs, the auctioneer cannot recover these costs against the principal in an action for money paid to his use; he must declare specially.

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1803.

SPURRIER *against* ELDERTON, one, &c.

sale: and this action was brought to recover those several sums so paid.

The other parts of the case being proved, the counsel for the plaintiff were proceeding to examine as to the expenses of the suit, which had been instituted against the plaintiff *Spurrier*, to recover the deposit.

Erskine, for the defendant, objected to it: That under the declaration in this action, the plaintiff could not go into any evidence to entitle him to recover that demand. The action was for money paid, laid out, and expended for the defendant's use. To entitle him so to recover, it should appear to be clearly money so paid, laid, and expended; and not be matter of doubtful liability or special agreement. If it was either, the plaintiff should have had a special count adapted to his case.

Gibbs, for the plaintiff, contended, That the defendant having employed the plaintiff to sell upon an invalid title, had, by putting it up to sale, subjected himself to the action, the ex-

[3

penses of which had been incurred in defending that title; and it was therefore money paid to the defendant's use, and the plaintiff entitled to recover it.

It was ruled by Lord ELLENBOROUGH, That the money paid on account of the costs in the cause, could not be recovered in this form of action, which was for money paid only; and to recover on the general count, it should appear clearly to be money actually and necessarily paid to the party's use: That there should have been a special count, inasmuch as the right to these costs by the plaintiff was not so apparent. The plaintiff might have defended the action of his own wrong, and without any authority from the defendant. If he had done so, he would not be entitled to call upon his principal to pay the costs, as they were incurred without his consent. If the plaintiff had declared specially, the defendant would then have had notice of these points; and he would have had the plaintiff's claim on the record, and have been prepared to contest it, which, under the present declaration, he could not be prepared to do. But, he was of opinion, the plaintiff might recover for the money actually paid on the other accounts.

Gibbs and *Barrow* for the plaintiff.

Erskine and *Hughes* for the defendant.

SECOND

SECOND SITTING IN TERM IN THE COMMON PLEAS. 1803.

Doe ex dem. Hindly *against* Rickarby.

THIS was an action of ejectment, to recover possession of premises situate in *Old Gravel Lane*, in the county of *Middlesex*.

Where there is a right of entry given for an assigning or underletting, if a person is found in the premises, appearing as the tenant, it is *primâ facie* evidence of an underletting sufficient to call upon the defendant to shew in what character such person was in possession, as tenant or as servant to the lessee.

The plaintiff grounded his right to recover possession of the premises mentioned in the declaration, upon a right of entry given by a covenant in a lease, which had been made by *Mary Hindly* to the defendant *Rickarby*.

The covenant was, That the defendant *Rickarby*, the lessee, should not assign or underlet the premises demised; and the lessor of the plaintiff relied on the defendant having underlet the premises in question to a person of the name of *Luthman*.

The evidence to prove the breach by underletting, given on the part of the plaintiff, was, That after the house had been for some time empty, a Mrs. *Luthman* had taken possession of it, and appeared as the tenant of it. A witness went to the house, which was then inhabited by Mrs. *Luthman*: he asked her how she came there, and by whom she had been let into possession of the house, and whether she was tenant to Mr. *Rickarby*; and was about to give Mrs. *Luthman*'s reply, when

Shepherd, Serjt. objected to the evidence: That what Mrs. *Luthman* had said was not evidence against *Rickarby*: That Mrs. *Luthman* ought herself to be called, to prove in what relation she stood to *Rickarby*, as to the possession: That she might have been put in there as servant to Mr. *Rickarby*, which would not have been an underletting sufficient to create a forfeiture. [5]

Lord Alvanley. If she is there in the character of a servant, why don't you prove it? The covenant is, that *Rickarby* shall not assign or underlet. The landlord finds a person in possession acting and appearing as the tenant; if she is so, there has been an underletting; and I am of opinion, that the declarations of the person found in the house is evidence. The only difficulty that could occur against the plaintiff was, to see whether Mrs. *Luthman* was found in the house, either as servant to *Rickarby*, or perhaps let in as a matter of favour and kindness: in either of

1803.

DOE ex dem. HINDLY *against* RICKARBY.

which cases there would be no breach of the covenant; but it was lawful for the plaintiff to inquire of the party whom he found in the house, in what way she occupied it; and if she said she rented it, and her occupation appeared as tenant of the house, I hold that it was sufficient for the lessor of the plaintiff to rely on it as a breach of the covenant, to entitle him to call on the defendant to shew in what character she in fact did occupy it; if not as tenant to the defendant, but in some other character.

Verdict for the plaintiff.

Best, Serjt. and *Espinasse* for the plaintiff.

Shepherd, Serjt. for the defendant.

[6]

SITTING-DAY AFTER TERM IN THE KING'S BENCH.

EAKEN *against* THOM.

Though a ship, when she sails on a voyage, is not seaworthy, and after part of the voyage is performed she is forced into port, and compelled to abandon the voyage, that does not entitle the sailors to recover wages for any part of the voyage.

ASSUMPSIT for seaman's wages.

Plea of *Non-assumpsit*.

The defendant was the owner of a ship, living at *Liverpool*; and had hired the plaintiff to proceed as mate on board the ship, on a voyage to *Philadelphia*. The ship sailed on the voyage, but was under the necessity of putting into *Cork*, not from any uncommon badness of the weather, but from the circumstance of the want of seaworthiness in the ship; which, on inspection, was found not to be capable of repairs; so that she was condemned and sold, and the voyage abandoned.

Erskine, for the plaintiff, admitted that, in common cases, freight was the mother of wages; and that if the ship was lost, the sailor had no claim: but he contended, that that was the case where the ship was seaworthy, when she sailed on her voyage, and, unless prevented by the common casualties of the sea, could have completed her voyage, and the seaman earned his wages. The owner, by sending out a ship incapable of performing the voyage, could not defeat the plaintiff's claim to

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wages where he had been willing to serve, and where the voyage was lost and defeated by reason of the defendant's own default, and not through any fault of the plaintiff.

Lord ELLENBOROUGH said, That the cases had never made the distinction contended for by Mr. *Erskine*. The rule of law was general.

general. The ship must perform her voyage to entitle the seaman to recover; and if the owner sent her out under such circumstances as were stated, it should be the object of a special action on the case: but he was of opinion, That the sailor could not, on the ground stated, recover his wages.

1803.

EAKEN *against* THOM.

The plaintiff afterwards proved, That after the vessel was found not to be in a capacity to proceed on the voyage, he was ordered to remain on board until she underwent some repair; which he did, and for which he claimed wages.

Lord ELLENBOROUGH ruled, That this being a new contract, the plaintiff was entitled to recover on that account, as for work and labour.

Verdict for the plaintiff.

Erskine and *Maryat* for the plaintiff.

Wigley for the defendant.

SITTING-DAY AFTER TERM IN THE COMMON PLEAS.

[S]

TURNER *against* EYLES.

May 26th.

THIS was an action of debt against the defendant, as warden of the Fleet, to recover a sum of 1002*l.* the amount of a judgment recovered at the suit of the plaintiff, against one *Thomas Johnstone*, who had been charged in execution; and, by the defendant, permitted to escape.

An averment of a writ, and return to this effect, "As by the said writ and return thereon, now remaining in court, more fully appears," is not supported, unless it has been filed, and an office-copy is offered in evidence.

The declaration, in the usual form, stated the judgment and several writs of execution issued against *Johnstone*, and a *capias ad satisfaciendum* directed to the sheriff of *Middlesex*; by virtue of which writ the sheriff took *Johnstone*, and kept and detained him in prison; until afterwards *Johnstone*, by virtue of a writ of *habeas corpus cum causa*, before then sued out of the court of our said Lord the King, before the King himself, against the said *Thomas Johnstone*, directed to the said sheriff, and returnable immediately after the said sheriff's receipt of the same, was, by the said sheriff of *Middlesex*, in obedience to that writ, taken before the honourable Sir *Soulden Lawrence*, at his chambers in *Serjeants' Inn*, *Chancery Lane*; and in and by the return of the said writ of *habeas corpus*, the said *Thomas Johnstone* was charged by virtue of the said writ of *habeas corpus*, by *Charles Turner*, with the said writ of *capias ad satisfaciendum*; and therefore the

1803.

TURNER *against* EYLES.

the said *Thomas Johnstone* was thereupon committed by the said Sir *Soulden Lawrence* to the custody of the Marshal of the *Marshalsea* of the Court of our said Lord the King; there to remain until he should have satisfied the said *Charles Turner* (the plaintiff) the said debt and damages aforesaid, in the said writ of *capias ad satisfaciendum* mentioned, as by the said writ of *habeas corpus*, and the return thereof, and the said commitment thereon, *now remaining in the said Court more fully appears.*

The plaintiff's counsel called the Marshal of the *King's Bench* prison. He produced the writ of *habeas corpus* referred to in the declaration, by which *Johnstone* had been committed to his custody. Being asked, from whence he had brought it? he answered, From the *King's Bench* prison; and where it was filed with the clerk of the papers.

It was then objected, by the defendant's counsel, that the evidence offered was not legal; neither did it support the allegation in the declaration: That the averment in the declaration was of a record. It stated the *habeas corpus* return and commitment as remaining in the Court of our said Lord the King: that was stating it as affiled of record. When so stated, it should come out of the place from where the records of the Court proceed. The *habeas* should have been filed, and an office-copy offered in evidence: That by a rule of the Court of *King's Bench*, every committitur was necessary to be entered on the roll; so that it should appear that *Johnstone* was legally in custody, which would
[10] appear by such committitur: That it was necessary for the plaintiff to have made this averment; and cited *Wightman* v. *Mullins*, 2 *Strange*, 1226.

It was answered by the plaintiff's counsel, That this was an immaterial averment, and therefore not necessary to be proved: That it never had been the practice to file writs of *habeas corpus*, nor was there any place for filing such writs; they were the authority by which the Marshal held the person in custody, and his authority for removing the prisoner from one custody to another, without subjecting him to an escape: That the form of them shewed that they were not to be returned. Other writs were returnable "Before us at *Westminster*," or "Wherever we shall be in *England*;" but writs of *habeas corpus* were to bring the body before a Judge of the Court, and returnable before the Lord Chief Justice; so that in fact it was not an act of the Court, but of a single Judge out of Court.

Lord ALVANLEY was of opinion, That the evidence did not support

support the allegation in the declaration; and nonsuited the plaintiff. 1803.

TURNER *against* EYLES.

Vaughan, Serjt. *Bayley*, Serjt. and *Espinasse* for the plaintiff.
Shepherd, Serjt. and *Lawes* for the defendant.

Vide 3 *Bos.* and *Pull.* 456, where the point here ruled was confirmed.

SITTINGS AFTER TERM IN THE KING'S BENCH. [11]

BERKLEY *against* WALMSLEY. *May* 27th.

If a person, upon whom a bill is drawn, and which has some time to run, gives the amount of the bill to the holder, deducting from it a sum more than the legal interest for the time the bill had to run, it is not usury.

THIS was an action of debt, on the stat. 12th of *Ann* for usury.

The declaration was in the common form, stating the usury in taking above legal interest for the forbearing and giving day of payment on a loan of 29*l.* 5*s.* from the 20th of *August* to the 7th of *September*.

The circumstances of the case were these: A bill of exchange was drawn by persons of the name of Messrs. *Hawkes*, on the defendant *Walmsley* for 30*l.* in their own favour, two months after date. It was by them indorsed over, and had come by indorsement into the hands of a Mr. *M. Cutler*; and became due on the 7th of *September*.

When it was in Mr. *Cutler*'s possession, he sent it to *Walmsley*, the defendant, for his acceptance, by a person of the name of *Jupp*; he applied to *Walmsley* for his acceptance, on the 19th of *August*. *Walmsley* said, "The bill has some time to run; if you will let me deduct the discount, I'll let you have the money now." *Jupp* said, He could then give no answer; but would communicate it to *Cutler*. He did so; and *Cutler* agreed to take it. The legal interest for the time the bill had to run, was 1*s.* 6*d.* only. *Jupp* brought it back to the defendant; who then said, He would [12] have 6*d.* in the pound for giving the money. *Jupp* told him, He would take what he thought right; and he accordingly deducted 15*s.* and paid over 29*l.* 5*s.* the remainder of the 30*l.*

Gibbs, for the defendant, objected: That this evidence did not support the declaration for usury; and that the plaintiff should be called: That to constitute usury, there must be a loan of money, which necessarily carried with it the idea of a party lending it, and having a right to call for a repayment. In this case there was no loan by *Walmsley*: he could never recal this money.

It

1803.

BERKLEY *against* WALMSLEY.

It was a mere payment of the debt by him before it was due, for which the other party consented to allow the sum deducted.

It was answered by the plaintiff's counsel, That the taking above five *per cent.* constituted usury, however disguised: That *Cutler* not being entitled to the money until the 7th of *September;* if he received it before that time, he was a debtor: and it was, *quasi,* a loan from *Walmsley* to him: That the offence of usury consisted in the taking of interest exceeding five *per cent.:* That by advancing the amount of the bill ten days before it was due, the defendant had received 15*s.* for the use of 29*l.* 5*s.* from the 28th of *August* to the 7th of *September,* which was clearly usurious, and which might be made a cloak for usury; as a party who was about to lend money might do it by having a bill drawn upon himself, and discounting his own bill at a usurious interest for the advance of the money.

[13] Lord ELLENBOROUGH at first inclined to hold it to be usurious, insomuch as the defendant had taken in discounting this bill above five *per cent.;* but his Lordship afterwards was of opinion, that it was not a loan of money sufficient to ground usury on it; and nonsuited the plaintiff, with liberty to move the Court to set the nonsuit aside.

Garrow and *Espinasse* for the plaintiff.

Gibbs and *Symonds* for the defendant.

In the next term the Court of *King's Bench* was moved to set aside the nonsuit, but the Court concurred in opinion with the Lord Chief Justice. See 1 *East's* Reports, 55.

SITTINGS AFTER TERM AT GUILDHALL, IN THE COMMON PLEAS.

KING *against* WARING et UX.

In an action for words imputing dishonesty and bad conduct to a servant, by which she has lost a place, evidence of antecedent good conduct is admissible.

THIS was an action for slanderous words, with a count for a libel, charged to have been written by the defendant's wife. Plea of Not Guilty.

The words of the libel were stated in the declaration to have been spoken and written of the plaintiff (who was a servant, and who had lived in the defendant's service) as having been spoken falsely, scandalously, and maliciously, imputing to her dishonesty and misconduct, by which she had been prevented from getting a ser-

1803.

KING *against* WARING.

a service from a Mrs. *Bosanquet*, who would have hired her, and taken her into her service.

The plaintiff having proved the words, called a witness, a person whom she had formerly lived with, to speak to her character while in his service.

This was objected to by the defendant's counsel, as the matter in dispute was not what she had been, but what was her character at the time of speaking the words.

Lord ALVANLEY ruled, That the evidence was admissible: That where the words charged the party with a crime or conduct, injurious to his reputation, it was allowable to receive evidence of an antecedently good character; general character was, in some respects, in issue. The words charged the plaintiff generally with dishonesty and misconduct while in service; and he should receive therefore the evidence as it referred to the plaintiff's situation in life, in answer to the slander, with which the defendant was charged.

Though a letter, giving a false character of a servant, may be the ground of an action, yet if written as an answer to a letter sent, not with a view of obtaining a character, but with an intention of obtaining such an answer as should be the ground of an action, no action can be sustained.

[* 15]

After the plaintiff had been discharged by the defendant, she had applied to a Mrs. *Bosanquet* to be hired; and referred her to the defendant, desiring Mrs. *Bosanquet* to send to the defendant for her character. Mrs. *Bosanquet* did write a letter to inquire into the plaintiff's character: in answer to which, Mrs. *Waring* wrote back the answer upon which the action was founded, as amounting to a libel. It stated her reasons for discharging the plaintiff, as a woman of improper conduct; but * which representation of the plaintiff was entirely without foundation.

It was suggested, That this letter, which Mrs. *Bosanquet* had been prevailed upon to write, was procured by the plaintiff with a view of getting such a reply, she being well apprised of Mrs. *Waring*'s sentiment, and not as a fair inquiry after character: its admissibility was therefore, on that ground, objected to.

Lord ALVANLEY. The question is, If, in consequence of the letter so written by the defendant, and which letter was false and unfounded, the plaintiff was prevented from getting a place? It has been decided, that giving a character to a servant, however injurious to them, yet if fairly given, would not sustain an action; but if the letter was procured by another letter, not written with a fair view of inquiring a character, but to procure an answer, upon which to ground an action for a libel, such evidence, I think, ought not to be admitted.

This

1803.

KING *against* WARING.

This was not proved, and the plaintiff had a verdict.

Cockell, Serjt. and *Wigley* for the plaintiff.

Best, Serjt. and *Barrow* for the defendant.

[16]

Sir JOHN CALL, Bart. *against* DUNNING.

On an issue of *non est factum* to declare on bond, the answer of the defendant to a bill in equity, in which he admits the execution, is not sufficient, unless some account is given of the subscribing witness, and why he is not called; for if it can be procured, he should prove the execution of the bond.

THIS was an action of debt on bond.

Plea of *Non est factum*.

To prove the execution of the bond under issue, the plaintiff produced an answer in Chancery by the defendant, to a bill filed by the plaintiff for a discovery; in which answer the defendant had admitted the execution of the bond.

The bond was witnessed by a person of the name of *Richard Wilson*.

Erskine, for the defendant, contended, That this evidence of the execution was insufficient and inadmissible, without proving that the subscribing witness was out of the jurisdiction of the Court, or dead, or without accounting, in some way, why he was not called; and that it had been decided, that a party should not even be allowed to confess his own deed.

It was answered by *Gibbs*, for the plaintiff, That though where the only issue between the parties was, whether the bond produced was the deed of the defendant or not, it had been required to produce the subscribing witness; that was to enable the defendant to shew if the deed had or had not been obtained by a fraud: That the defendant having had an opportunity therefore of stating in his answer, if there had been any fraud; and not having done so, it stood on the single question of Whether the deed was the defendant's or not? and having admitted it, it was sufficient proof of the issue.

[17]

Lord ELLENBOROUGH said, That the settled rule of evidence was, in all cases, to call the subscribing witness. Cases certainly had occurred, in which that had been dispensed with: that might have been the case here, if a proper foundation had been laid, by proving inquiries to have been made after the subscribing witness; and that he could not be found, or that he was not within the reach of the process of the Court. But without such evidence, he thought that what was offered in the present case was insufficient; and that the plaintiff must be called.

Gibbs and *Const* for the plaintiff.

Erskine for the defendant.

This

1803.

Sir J. CALL, Bart. *against* DUNNING.

This case was afterwards moved; but the Court agreed with the Lord Chief Justice, and refused a rule to set the nonsuit aside. *Vide Abbott* v. *Plumbe, Dougl.* 116. *Laing* v. *Raine*, 2 *Bos.* and *Pull.* 85. But where the deed was in the hands of the defendant, and it was relied upon to be an act of bankruptcy, it having been made by a bankrupt to the defendant, the admission of the defendant, on his examination before the commissioners that the bankrupt had executed such a deed, was held to be good evidence, without the subscribing witness. *Bowles* v. *Langworth*, 5 *Term Rep.* 566.

LEAME *against* BRAY.

[18]

June 7th.

In an action of trespass, *vi et armis*, for driving a chaise against another, and injuring it, the plaintiff must prove that the defendant, the owner, was actually driving it; inasmuch, as if it was driven by a servant, the action would not lie.

THIS was an action of trespass, *vi et armis*.

The declaration stated, that the defendant, with great force and violence, drove a certain one-horse-chaise of him, the defendant, against a certain curricle, wherein the plaintiff was then riding, by which he was thrown out, much hurt, and the chaise broke to pieces.

The defendant pleaded the general issue, not guilty.

The plaintiff proved the accident having taken place on the road near *Stockwell*. There was no evidence by whom the one-horse-chaise was driven, except that *Bray*, the defendant, was seen at *Stockwell* about ten minutes after the accident; and that the accident having been mentioned at *Aldridge*'s sale some time after, he said that his own chaise was broken to pieces; but there was no direct admission by him that he had been driving the chaise at the time of the accident.

The defendant's counsel insisted the plaintiff should be called; for that if the chaise was driven by a servant, trespass *vi et armis* would not lie; and cited *Macmanus* v. *Crickett*, 1 *East's Rep.* 106.

The plaintiff's counsel contended, That it must be presumed the owner was driving, from the circumstance of his having been seen at *Stockwell* so soon after, coupled with the conversation at *Aldridge*'s; but that at all events, it was evidence for the jury.

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Lord ELLENBOROUGH ruled, That it was not a matter of presumption to be left to a jury, whether the chaise was driven by the master or by a servant: as in case it was driven by the latter, the plaintiff had misconceived his action. It should therefore be proved.

The plaintiff afterwards called a person who had been in the chaise with the defendant, who proved that the defendant himself

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LEAME *against* BRAY.

self had been driving it when the accident happened; and a verdict was found for the plaintiff.

Erskine, *Garrow*, and *Hovell* for the plaintiff.

Gibbs and *Park* for the defendant.

MILLER *against* WILLIAMS.

If a party's residence is out of the jurisdiction of the *Court of Conscience* of *London*, his occasionally underwriting a policy at *Lloyd*'s Coffee-house, where he has a seat, is not a seeking his livelihood within the city, so as to subject him to its jurisdiction: it must be followed as a trade or business.

[*20]

ASSUMPSIT to recover the amount of a shoemaker's bill. The demand was for 3*l.* 1*s.*

The debt was not denied to that amount; but in order to defeat the claim of the plaintiff to costs, it was set up by the defendant, that he was liable to be summoned to the *Court of Conscience* in *London*, under the statute of 39 and 40 *Geo.* 3. *c.* 104., giving jurisdiction to the *Court of Conscience* in *London*, as to debts to the amount of 5*l.*

By the fifth clause of that statute it is enacted, "That it shall be lawful for any person or persons, whether residing within the city of *London* or elsewhere, who shall have any debt due to them, not exceeding 5*l.* from any person or persons whatsoever, residing or inhabiting within the city of *London*, * or the liberties thereof, or keeping any house, warehouse, shop, shed, stall, or stand, or seeking a livelihood, or trading or dealing as aforesaid, to cause such debtor or debtors, person or persons, from whom such debt or debts shall be due and owing, or claimed and demanded, and so resident, inhabiting, or keeping any house, warehouse, shop, shed, stall, or stand, or seeking a livelihood, or trading or dealing as aforesaid, to be warned or summoned by personal service, or by a printed or written summons left at the dwelling-house, lodgings, or place of abode, warehouse, shop, shed, stall, stand, or any other place of dwelling of such debtor, within the jurisdiction of the Court of Requests, to appear before the commissioners at *Guildhall*, &c. who, if the debt does not exceed 5*l.* have power to make order for the payment." And by the 12th clause of that statute, it is further enacted, "That if any action or suit shall be commenced in any other Court than the said *Court of Requests*, for any debt not exceeding the sum of 5*l.* and recoverable by virtue of the said recited acts, and of this act, or any of them in the said *Court of Requests*, then and in every such case, the plaintiff or plaintiffs in such action or suit shall not, by reason of a verdict for him, her, or them, or otherwise have or be entitled to any costs whatsoever; and if the verdict shall be given for the defendant or defendants in such action

tion or suit, and the judge or judges, before whom the same shall be tried or heard, shall think fit to certify that such debt ought to have been recovered in the said *Court of Requests*, then * and so often such defendant or defendants shall have double costs; and shall have such remedy for recovering the same as any defendant or defendants may have for his, her, or their costs in any cases by law."

[*21]

The defendant was an underwriter at *Lloyd*'s Coffee-house. His dwelling-house was out of the jurisdiction of the city of *London*; but he had a seat at *Lloyd*'s, and there followed the business of an underwriter, by underwriting policies of insurance in the usual way.

Erskine contended, That though in fact his residence was out of the city of *London*, and so out of the jurisdiction of the *Court of Conscience*, he came under the description of a person trading, dealing, and seeking a livelihood within the city of *London*, according to the meaning and terms of the act: that his business and occupation was that of an underwriter: he sought a living by it; and so came within the description of the act.

Lord ELLENBOROUGH said, That he thought that, by possibility, a person carrying on business as the defendant did, as an underwriter, might be subject to the jurisdiction of the *Court of Conscience*, if he followed it as his trade, or mode of gaining a livelihood; but that must depend upon the quantity of business which he did, and the mode in which he followed it. He should therefore expect evidence to be given to that effect. A person occasionally underwriting a policy, could not be said to be thereby trading, or seeking a livelihood.

It was then suggested by the plaintiff's counsel, That the defendant had paid *11. 9s.* into Court, which was an admission of the jurisdiction of the Court; so that the objection could not be taken.

[22]

Lord ELLENBOROUGH ruled it to be so.

Verdict for the plaintiff.

Garrow and *Gurney* for the plaintiff.

Erskine for the defendant.

HOFFMAN, Assignee of PHELPS, *against* PITT, Gent.

ASSUMPSIT for money had and received.

The action was brought by the assignees of one *Phelps*, a bankrupt, to recover the amount of the value of an house, furniture, &c. which had belonged to *Phelps*, the bankrupt, which had been sold, and the money received by the defendant.

A bankrupt cannot be called to explain an equivocal act of bankruptcy.

The

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HOFFMAN, Assignee of PHELPS, *against* PITT.

The plaintiff relied on an assignment by deed, made by the bankrupt on the 23d of *February*, 1802, to the defendant, of his house, furniture, and pictures; which was, in fact, of every thing which he possessed, as being in itself an act of bankruptcy, and so entitling him to recover; it being stated, that the bankrupt had no warehouse or property of any kind, except what was contained in his dwelling-house; so that in fact it was an assignment of all his property, and so an act of bankruptcy.

[23] The defence was, That the defendant having long known the family of the wife of the bankrupt; and having, on the 14th of *December*, 1801, come to town, and gone to the house of the bankrupt, he found an execution in the house for 700*l.*: That, out of motives of regard to the family, he advanced that sum; and took from the sheriff a bill of sale of the furniture of the house: That in *February* following, another execution was sent into the house, when the defendant paid off that execution, and took another bill of sale from *Phelps*, the bankrupt himself, including the house, which had not before been assigned; and the furniture, which had. This last was the assignment in question relied upon to be an act of bankruptcy.

On the execution of this second deed, a Mrs. *Pindar*, who was a friend of the defendant, and mother of the bankrupt's wife, went into the house to take possession for the defendant; and after that, *Phelps*, the bankrupt, and his wife, quitted the house, and returned no more.

The defendant first stood on the title derived under the sheriff's bill of sale, and produced the assignment from the sheriff; and proved the execution of it by the sheriff's officer, the subscribing witness.

This, it was contended, was sufficient to prove a *bonâ fide* purchase, and a sufficient title to the defendant.

Gibbs, for the plaintiff, objected: that the judgment should be produced; and that the mere production of an assignment, made by the sheriff under an execution, was not sufficient, because the

[24] goods were claimed as against creditors, which the assignees were.

Erskine contended, That it was sufficient, the property being conveyed by the deed.

Lord ELLENBOROUGH said, That the judgment was necessary to be produced, as it was that under which the defendant claimed title, the assignment being from the sheriff, who had not title, but in consequence of the judgment and execution founded on it.

It was then suggested, that the deed of *February* 1802, was not

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HOFFMAN, Assignee of PHELPS, *against* PITT.

an act of bankruptcy: That in fact it did not convey the whole of *Phelps*'s property; but was an assignment of a part only, given as a security, and given *bonâ fide*; and to prove it, the bankrupt was called. He was asked by *Erskine*, If the assignment of the 23d of *February* did, or did not, comprize the whole of his property? or whether he had any other property, of any description, except what was contained in that deed?

This was objected to, as being virtually calling him to prove or disprove his own act of bankruptcy. It being an act of bankruptcy or not, as the effects turned out to be, or not to be, the whole of his property: That a bankrupt could not be asked to any thing affecting his act of bankruptcy, which this was.

Erskine contended, That a bankrupt may be called to explain a doubtful act, which might be or not an act of bankruptcy, to explain *quo animo* it was done.

Lord ELLENBOROUGH. To allow this would go the length of taking the sting out of the transaction, which is to constitute [25] the act of bankruptcy. He might be asked, in the same way, did he give orders to have himself denied? It goes to defeat the act of bankruptcy; and by a similar mode, it could be made a mode of proof of the bankruptcy. It cannot be admitted.

It was further suggested by the plaintiff's counsel, that possession had not been taken by the defendant immediately on the execution of the assignment to the defendant: that it was therefore void, under the case of *Edwards* v. *Harben*, 2 Term Rep. 587.; and that the defendant could not claim any title under it.

Lord ELLENBOROUGH said, the not taking possession was, in some measure, indicative of fraud; but was not conclusive: that this point had occurred on the northern circuit, and the Court had held it so: but to make it absolutely void, there must be something that shewed the deed fraudulent in the concoction of it. It was incumbent on the person claiming title to shew that the transaction was *bonâ fide*.

The judgment not being produced, the Chief Justice was of opinion, that the plaintiff's title, under the deed of the month of *December*, was not made out: and that the deed of the 25th of *February* being an assignment of the bankrupt's whole property, was an act of bankruptcy; and that the plaintiff was entitled to recover.

Gibbs and *Holroyd* for the plaintiff.

Erskine, *Garrow*, and *Dauncey* for the defendant.

CASES

CASES

ARGUED AND RULED

AT

1803. # NISI PRIUS,

IN THE

KING'S BENCH;

TRINITY TERM, 43 GEO. III.

FIRST SITTING IN TERM AT GUILDHALL.

EVANS et alt. *against* BEATTIE, Executors of JAMES BEATTIE, deceased.

On a guarantee to pay for goods sold and delivered to a third person, what such person has said respecting the goods sold to him, is not evidence to charge the person giving the guarantee; the delivery of them must be proved

[27]

THIS was an action of *assumpsit*.

The declaration stated, that in consideration that the plaintiffs, who were woollen manufacturers, would supply one *Thomas William Copper* with goods, in the way of their trade, the testator, *James Beattie*, in his lifetime, undertook and promised the plaintiffs to guarantee them the payment for such goods as they should so send to *Copper*, in the way of their trade. The defendant then averred, that they had supplied *Copper* with goods to a large amount, for which the said *T. W. Copper* had not paid; by reason of which the testator became liable.

There was a plea of the general issue, with several special pleas of *plene administravit*, and bonds outstanding.

To prove that the plaintiffs, in *Beattie*'s lifetime, had delivered to *Copper* goods according to the agreement, the plaintiffs called the book-keeper of *Copper*. He proved, that, in the month of *September*, 1801, *Copper* was indebted to the plaintiff in 1000*l*. which he said was for goods sold to him by the plaintiffs.

To prove a further sum due, the counsel for the plaintiffs asked as to the admission made by *Copper* the principal, of other goods

goods had by him; and for which he was indebted to the plaintiffs. 1803.

EVANS et alt. *against* BEATTIE.

This was objected to by the defendant's counsel, that what he said could not be evidence. The fact was known to *Copper*; and he should be called.

It was argued for the plaintiffs, that the liability of the testator depending on the extent of the debt due by *Copper*, by which the testator had made *Copper*'s debt his own, that what would be evidence to charge *Copper*, should be evidence to charge the testator; and as his admission would be sufficient as against himself, it should be so against the defendant.

Lord ELLENBOROUGH ruled, that what *Copper* had been heard to say, was not sufficient evidence to charge the defendant. The engagement was to pay for such goods as should be delivered to *Copper*; not which he should acknowledge to have received. The testator or defendant had a right to have that delivery proved. There might be collusion between the plaintiffs and *Copper*. The evidence offered was not the best the case was capable of; the evidence of *Copper*'s admission was therefore rejected; but the plaintiffs proved a further delivery of goods to *Copper*. [28]

Verdict for the plaintiffs.

Erskine, *Park*, and *Littledale* for the plaintiffs.

Garrow, *Gibbs*, and *Espinasse* for the defendant.

LAST SITTING IN THE COMMON PLEAS.

CLARKE *against* LESLIE.

THIS was an action of *assumpsit*.

The several counts of the declaration were for meat, drink, and other necessaries, found and provided for the defendant; money lent and paid to the defendant's use, with other common money counts.

Plea of the general issue.

Part of the demand claimed arose in this way: the defendant had been arrested by a writ out of the *Marshalsea* Court, for

Money advanced to an infant to procure him liberation from an arrest, which was for necessaries, or where he was in execution, may be recovered in *assumpsit*; but to entitle the plaintiff so to recover, he must shew the real transaction, and that the money was advanced under such circumstances.

1803.

CLARKE *against* LESLIE.

7*l.* 2*s.* 6*d.*; and was in custody of the officer. The plaintiff was sent for, and paid the debt to the officer; in consequence of which the defendant was discharged out of custody.

The defence to the action was infancy; and it was objected by the defendant's counsel, that this sum so stated to be paid by the plaintiff to the officer, could not be recovered against an infant: that it could be recoverable only as money lent and advanced by the plaintiff to the defendant, or as paid to her use; and in either of which cases an infant was not liable; for to entitle the party to recover the demand, it must be for necessaries, or money advanced and directly applied in the payment for necessaries.

[29]

It was answered, that the money paid by the plaintiff to procure the defendant's discharge, was to be deemed necessaries: that the legal meaning of necessaries was not confined to mere meat, drink, education, or articles of that description: that *that* which procured the defendant her liberty, which enabled the defendant to earn her bread, came equally under the description for necessaries; and as such was recoverable.

Lord ALVANLEY. I agree that the demand in question may come under the description of necessaries. If the defendant had been taken into custody for a debt contracted for necessaries, discharging that demand would be to pay for necessaries; so if the defendant had been in execution; that is, if at all events the defendant had made herself liable to the debt, and could not controvert it, paying that debt, I think, would be necessaries. This is my opinion; and it was the opinion of other judges of great learning: but, I think, that the plaintiff must shew that the debt, which was so paid here, was either for necessaries, or that the party was in execution. If this was not to be required, an arrest for a supposed or fraudulent debt might be made, and the infant might be subjected to the payment of the money advanced to liberate her from an arrest, for a demand for which an infant could not legally be made liable. If therefore the plaintiff can prove that the money paid at the spunging-house was paid to extricate her from imprisonment for a lawful debt, for which she was liable, and might have gone to jail, or if she was then in execution, I think the money paid may be recovered, as being expended for the benefit of the infant; but if no evidence of that kind is given, as she may have been in custody on mesne process for a debt to which she as an infant was not liable: as she may have been arrested fraudulently by the very plaintiff, to cover

[30]

cover the advance of money, I think the plaintiff cannot recover. I go farther; for even if this debt in the spunging-house were to be considered as for necessaries, I am not prepared to say, that if the plaintiff had paid the debt for the infant, in order to enable her to return to a state of prostitution, as has been suggested, so that the debt thereby created must be discharged by the wages of prostitution, the plaintiff would, in that case, be entitled to recover; for the transactions would be tainted by the same immoral consideration. 1803. CLARKE *against* LESLIE.

The plaintiff was not prepared with any evidence to this effect; and the defendant had a verdict.

Best, Serjt. and *Espinasse* for the plaintiff.

Bailey, Serjt. for the defendant.

SITTINGS AFTER TERM AT GUILDHALL, IN THE KING'S BENCH. [31]

DITCHBURN *against* SPRACKLIN, DIGGBY, BAKER, and SAUNDERS.

THIS was an action of debt, for cordage supplied to the brig *Brothers' Adventure*, charging the defendants as the owners. A former action had been brought, in which *Saunders* was not included. The three first defendants pleaded in abatement, that *Saunders* was a partner, and not included in the action. The plaintiff entered a *cassetur billa*; and the present action was then commenced.

If a plaintiff in an action for goods sold, state them to be his goods, and they are his and another's, it is fatal.

The declaration stated, That the defendants were indebted to plaintiff in —*l.* of lawful money, &c. for divers goods, wares, and merchandise of him the said —— *Ditchburn*, before that time sold and delivered, &c.

The defendants pleaded the general issue.

To prove the defendants joint-owners of the vessel, the register was produced. It was accompanied by the usual affidavit of the three defendants, *Spracklin*, *Diggby*, and *Baker*, that they were the owners of the vessel; but there was no affidavit of *Saunders*, that he was an owner.

It was objected by *Erskine*: that this was not sufficient evidence to affect *Saunders*: that any person might put a name of a stranger into a register; and if its being found there was sufficient [32]

1803.

DITCHBURN *against* SPRACKLIN, DIGGBY, BAKER, and SAUNDERS.

cient to charge him, he might be charged with a debt which he never contracted for.

Lord ELLENBOROUGH said, he was of opinion that this was not sufficient; that the form of ascertaining the ownership had not been complied with. As however he had known such evidence admitted, as the entry was by an act of public notoriety, he would not nonsuit the plaintiff; but he would not assent to the doctrine of binding a man by an act to which his assent or concurrence could not be proved.

It appeared afterwards in evidence, that *Ditchburn*, the plaintiff, at the time the work was finished, had a partner of the name of *Griffiths*, who had died soon after. The declaration was for goods of the plaintiff, sold and delivered.

It was objected by the defendant's counsel: that the plaintiff should have declared as surviving partner; and, secondly, that the goods were stated to be *Ditchburn*'s; whereas they were *Ditchburn*'s and *Griffiths*'s.

Lord ELLENBOROUGH ruled, that the plaintiff might declare without so describing himself as surviving partner; but that there was a misdescription as to the goods, which was fatal.

The plaintiff was nonsuited.

Garrow and *Abr. Moore* for the plaintiff.

Erskine and *Donaldson* for the defendant.

[33] SITTINGS AFTER TERM AT WESTMINSTER.

July 4th.

PARISH q. t. *against* BURWOOD et alt.

In an action of debt q. t. for selling coals contrary to law, the contract upon which the penalty arises must be truly stated, and any variance is fatal: therefore, where the contract was stated to be with two persons, and in fact it was with those two and another, it was ruled to be a fatal variance, though the declaration stated the exact quantity which the two were to have.

THIS was an action of debt *qui tam*, to recover the penalties given by several statutes made for regulating the sale and measure of coals, and to prevent frauds in the sale of them.

The action was brought against the defendants, who were coal-merchants, for selling coals by a measure contrary to law.

The declaration stated, that the defendants, on the 6th day of *September*, 1802, in the parish of *St. George*, &c. did fill divers, to wit, thirty-four sacks with coals, then and there sold by the

said

1803.

PARISH q. t. *against* BURWOOD et alt.

said defendants to *Isaac St. John* and *John Tripenny* as and for *Pool*-measure; and afterwards carried the same coals in the said sacks, and delivered the said coals to the said *Isaac St. John* and *John Tripenny*, &c. contrary to the statute; and by which, &c.

St. John and *Tripenny* were called as witnesses. They proved that they, together with one *Lowe*, and on their joint account, purchased from the defendants five chaldrons of coals: that thirty-four sacks, part of the five chaldrons, were delivered to them.

Erskine, for the defendants, contended, that the plaintiff should be nonsuited: that the offence was grounded upon a contract for the sale of coals, which the declaration stated to be for thirty-four sacks, sold by the defendants to *St. John* and *Tripenny*; whereas the contract proved, was for five chaldrons sold to *St. John* and *Tripenny*, together with *Lowe*: that it was a material averment, as otherwise the defendant might be subjected to many actions, as the divided delivery would subject the party to several actions.

[34]

It was answered by the plaintiff's counsel, that the declaration stated only the filling of thirty-four sacks, sold to *St. John* and *Tripenny*, which was proved: that there was in fact a contract with those persons sufficient to sustain the averment; inasmuch, as if the defendants had brought an action for goods sold against *St. John* and *Tripenny*, they would have recovered, unless there had been a plea in abatement.

Lord ELLENBOROUGH said, that it at first occurred to him, that it might be taken only as inducement; but that he then thought, it was a material averment, which ought to be proved; and that the variance was fatal. His lordship referred to the case of *Bristow* v. *Wright* and *Pugh*, in *Douglas*, 640.

In this case, the delivery to *St. John* and *Tripenny* was a subcontract made among themselves; but the contract for the coals with the defendants was with them and *Lowe*. The declaration therefore did not state the contract as it was; and the variance was fatal.

The plaintiff was nonsuited.

Garrow and *Lawes* for the plaintiff.

Erskine for the defendant.

DEAN

1803.

DEAN *against* BRANTHWAITE.

The owner of chaises and horses let out to hire, is liable for accidents arising from misconduct or negligence of the drivers, not the person who hires the chaise; the owner may therefore maintain trespass *vi et armis*, for an injury done to his horses and carriage while so employed, and against the person who has hired them.

THIS was an action of trespass, *vi et armis*.

The injury stated in the declaration, was for scourging and beating two of the plaintiff's horses, striking them violently, and driving immoderately: by reason of which one died, and the other became sick and distempered.

The defendant pleaded, first, the general issue. Secondly, a justification: that the plaintiff had let the defendant four horses, to be driven by the plaintiff's two servants, for the purpose of drawing the defendant's chaise from *London* to *Epsom*: that one of the said servants, who was employed to drive the two horses which had been injured, was intoxicated, and unable to ride and manage the horses, and proceed on the journey, without danger to the defendant; by reason of which, and because the said servant could not drive, the defendant took the two horses, and he gently rode on one, and gave them gentle strokes, for the driving of them at a reasonable rate, and doing as little damage as possible, &c.

Thirdly, he pleaded a justification, differing from the second only in stating, that the plaintiff had let two horses, stating the post-boy's inability, but omitting drunkenness.

Replication to both, *de injuria sua propria*.

It appeared in evidence, that the plaintiff was a stable-keeper, and let horses and chaise to hire: that he had let four horses to the
[36] defendant, to draw his chaise to *Epsom* races: that he proceeded on the journey; when the defendant either conceiving that the postillion who rode the wheel-horse, was drunk, or drove too slow, he forcibly pulled him off his horse, and made the other change to the wheel-horses; then mounted the leaders, and drove so violently, that one of the leaders died; and the other was very much injured.

Erskine, for the defendant, objected: that the action was misconceived: that it appeared by the evidence, the horses were let to the defendant for a particular purpose: that while they therefore so continued under his controul, by reason of that he would be answerable for any injuries that were done by the postillion; as for example, by running against another carriage: that being completely under his care, and the master having no controul over them, the action should therefore have been case, for an abuse

abuse of that committed to him under a contract; and not tres- 1803.
pass, as it was here brought.

DEAN *against* BRANTHWAITE.

Lord ELLENBOROUGH. I have turned that objection in my mind while the cause was going on, conceiving that it might be made; but, I am of opinion, it is not sufficient. It appears to me, that a person who hires horses to convey him in the manner here stated, has not the entire management and power over the horses; but that they continued under the controul and direction of the stable-keeper's servants who were entrusted with the driving; and that he would be answerable for any accidents produced by the post-boy's misconduct on the road. Several actions had been maintained where accidents have happened under [37] similar circumstances, where the declaration stated that the stable-keeper had the care and custody, management and direction of his horses by means of his servant; and which averment could not be supported upon any other principle, as it would be a false averment, if his dominion over them was at an end when hired to go a stage or two. His lordship added, that he remembered a case before Lord KENYON, of one *Fleming*, in which damages were recovered against the owner of the chaise, for an injury done by it when Mr. *Burton*, a Welch judge, was in it, and who was called as a witness. In that case, it was not thought of taking the objection, that the person who hired the chaise was answerable for the post-boy's misconduct. The action therefore, in point of form, was rightly conceived.

When the evidence in support of the justification was gone through, it was objected, by the counsel for the plaintiff, that it did not support the justification; which was, "that the post-boy who rode the horses which had been injured, was drunk;" whereas it appeared, that if either was drunk, it was the boy who drove the wheel-horses, who was not then injured; and so there was a variance.

Lord ELLENBOROUGH was of opinion, that there was a fatal variance, and the plea was not supported by evidence; and the plaintiff had a verdict on the several issues. Damages, 41*l*.

Garrow, *Gibbs*, and ——— for the plaintiff.

Erskine and *Abbott* for the defendant.

SITTING-

1803.

SITTING-DAY AFTER TERM AT GUILDHALL.

July 12th.

RAWLINS and another, Sheriff of Middlesex, *against* DANVERS.

If to debt by the sheriff on a bail-bond, the defendant pleads *nil debet*, and the plaintiff does not demur, but takes issue on it, it lets the defendant into any defence which he may have to the action.

THIS was an action of debt on a bail-bond, brought in the name of the sheriff of *Middlesex*; but in fact on account of the officer. It had been given for the appearance of one *John King*.

The defendant pleaded *Nil debet*; upon which issue was joined.

Marryatt for the plaintiff, in opening the case, stated, that the plea being bad in point of law, he did not conceive that he was called upon to prove any thing, the execution of the bond not being denied.

It was answered by *Garrow*, for the defendant, that the plea was clearly bad: but that it was incumbent on the plaintiff to have demurred to it; and that not having done so, it let in the whole defence of the defendant, to shew that he ought not to be charged; which defence was, that the bail-bond having been given for the appearance of *King*, had been taken by an officer of the name of *Cawdron*, who had the warrant to arrest *King*: that the officer, *Cawdron*, had settled with *King*, so that *King* could not have been surrendered in the defendant's discharge, and so that the penalty could not be saved; and as the action, though brought in the name of the sheriff, was in fact *Cawdron*'s own, and *Cawdron* had by his own act acquiesced in *King*'s not appearing, according to the exigency of the writ, he therefore should not be allowed to proceed against the bail.

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Lord ELLENBOROUGH said, he was of opinion that, as the plea had not been demurred to, the plaintiff had thereby let the defendant into any defence that he could prove.

Gibbs, as *amicus curiæ*, said, that he had, many years ago, been nonsuited by Lord MANSFIELD, who had ruled in the same way; he being only prepared to prove the execution of the bond.

The defendant failed in proving the matters suggested in his defence, and the plaintiff had a verdict.

Marryatt for the plaintiff.

Garrow for the defendant.

1803.

CLIFFE *against* LITTLEMORE.

Same day.

THIS was an action of assault and false imprisonment.

The defendant pleaded, first, Not Guilty. Secondly, That just before the time when, &c. the plaintiff made an assault on him; and thereupon the defendant then and there gave charge of the plaintiff to a certain peace-officer, who then and there saw the plaintiff assault and beat the defendant; *and the said peace-officer gently laid his hands on him, and the defendant in his aid, in order to take the plaintiff before an alderman of the city, &c. which is the same trespass, &c.

In an action for an assault and false imprisonment, with a justification that the plaintiff, having been guilty of a breach of the peace, the defendant had given him in charge to a peace-officer, the person so described must be a person sworn into the office as constable, not a patrol employed and paid to take up disorderly persons, or of that description.

Replication of *de injuria sua propria absq. tali causa*, and issue therein.

The plaintiff proved, That in passing through *Fleet Market*, a dispute having arisen between the defendant and a little girl, who had purchased some articles from the defendant, in which he dealt, he had interposed in favour of the child, when the defendant, being incensed at his interference, took him into custody, and gave him in charge to one *Challis*; by whom, together with the defendant, he was carried to the *Poultry Compter*, where he was confined.

It appeared in evidence that *Challis* was a person employed by the parish, for the preservation of good order, to take up disorderly persons; which, when he did, he brought them before the constable, before whom they were regularly charged: but that he himself was not a constable, nor in any way sworn into the office; but, in fact, was merely a patrol, so employed and paid by the parish.

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Lord ELLENBOROUGH upon this evidence, ruled, That the defendant could not stand on that plea. He said that the plea was, That the plaintiff having assaulted the defendant, the defendant gave him in charge to a peace-officer. To support this plea, the person into whose charge he was given, must be a person so known and so accredited as a peace-officer. No person could act as a peace-officer, with all the immunities and rights belonging to that office, unless he had been regularly sworn into the office. Here the person to whom the charge was given was not of that description: he had no more right than any common person had to interfere, to prevent a breach of the peace, and to bring

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1803.

CLIFFE *against* LITTLEMORE.

bring the party offending before the constable. The defendant had therefore failed in making out that plea.

Verdict for the plaintiff.

Park and *Curwood* for the plaintiff.

Garrow and *Marryatt* for the defendant.

July 15th.

COBBAN and Another, *against* DOWNE.

Where goods are to be carried coastwise, and the usage of the wharf is to deliver them on the wharf to the mate of the ship, by which they are to be carried; if they are delivered to the mate, the wharfinger's responsibility is at an end, and he is not liable, though the goods are lost from the wharf before they are shipped.

THIS was an action brought against the defendant, who was a wharfinger, to recover the value of a parcel of goods, which had been sent to the defendant's wharf to be forwarded to *Inverness*, in *Scotland*.

The plaintiff proved the sending of four trusses to the wharf, one of which was lost. They were directed to be sent by the ship *George*, bound for that port.

The case, as to the facts proved on the part of the defendant, was, That the goods were brought to the wharf, and laid at the door of the counting-house: that while they lay there, the mate of the *George* was called: that he came; and the truss in question was delivered to him; what afterwards became of it did not appear.

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*It was contended, on the part of the defendant, That it was not part of the duty of a wharfinger, where goods are to go coastwise, either according to general usage, or the particular usage of the defendant's wharf, to see the goods actually put on board; that they were, in many instances, delivered from the warehouse, or from the wharf to the mate of the vessel, to be by him and his crew put on board the vessel; and that on the delivery to them, all further responsibility on the part of the wharfinger was at an end.

Several wharfingers were called, who proved the invariable usage to be so: that goods, which were not to go coastwise, were delivered from the carts on board the ship: that when goods came to the wharf, and no ship was then at the wharf bound for the port to which the goods were directed, they were warehoused; and on the arrival of the first ship they were delivered to the mate of the vessel: but when a vessel was there, they were immediately delivered to him, to be put on board: that before the shipping foreign goods, the wharfinger charged for wharfage and shipping; but for shipping goods coastwise, they charged for wharfage only, considering that they had nothing to do with the

the shipping, being satisfied with a delivery to the mate, or other officer on board the ship, as putting an end to their responsibility. 1803.

COBBAN and Another *against* DOWNE.

Lord ELLENBOROUGH. This is an action, charging the defendant in his character of a wharfinger. What the duty of a wharfinger is, is to be measured by the usage and practice of others in similar situations, or his known and professed liability. [43] Every man contracts with the public according to the known and ascertained extent of the trade or business in which he is engaged. The defendant has proved that, by established usage, the goods are delivered by the wharfinger to the mate and crew of the vessel which is to carry them; from which time it has been considered that their responsibility is then at an end. Undoubtedly, where the responsibility of the ship begins, that of the wharfinger ends; and a delivery to the ship creates a liability there: but the delivery must be to an officer or person accredited on board the ship; it cannot be delivered to the crew at random: but the mate is such a recognized officer on board the ship, that delivery to him is a good delivery, and the responsibility of the ship attaches, if the jury believe that the mate received the goods, as stated by the defendant's witnesses. It has been said, that they were lost on the wharf before they were put on board; but if they were once well delivered to the mate, the subsequent loss cannot affect the wharfinger: they are delivered into the care of the mate; and his negligence cannot revive any responsibility on the part of the wharfinger. I think therefore the usage has been sufficiently proved; that by a delivery to the mate of the ship, the wharfinger's responsibility was at an end; and that the only question for the jury to decide, was the delivery made of the goods to the mate of the *George*, by which vessel the goods were ordered to be sent?

Verdict for the defendant. [44]

Garrow and *Manley* for the plaintiffs.

Erskine and *C. Warren* for the defendant.

CLAY *against* WOOD.

Same day.

THIS was an action on the case, for negligently driving a chaise against a certain horse of the defendant's, on which the plaintiff's servant then rode, by which he had his thigh broke; in consequence of which he died.

It is no justification to an action for negligently driving, that the plaintiff was on the wrong side of the road, if there was room sufficient for the defendant to pass without inconvenience.

The

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CLAY *against* WOOD.

The facts were, that the plaintiff's servant was riding on the wrong side of the road; but near the middle of it. The defendant was the owner of a chaise, then driven by his servant, coming out of another road, and crossing the road over to that side of the road on which the servant was riding, which was the proper side of the road for the defendant. In so crossing over, the shaft of the chaise struck the horse in the thigh, and broke it.

The defendant's counsel relied, That it was the duty of the servant to have kept on his proper side; and that the accident being occasioned by his being so out of his place, the defendant was not liable.

Lord ELLENBOROUGH said, That the circumstance of the person being on the wrong side of the road was not sufficient to discharge the defendant; for though a person might be on his wrong side of the road, if the road was of sufficient breadth, so
[45] that there was full and ample room for the party to pass, he was of opinion he was bound to take that course which should carry him clear of the person who was on his wrong side; and that if any injury happened, by running against such person, he would be answerable. A person being on his wrong side of the road could not justify another in wantonly doing an injury, which might be avoided. The question therefore to be left to the jury was, whether there was such room, that though the plaintiff's servant was on his wrong side of the road, there was sufficient room for the defendant's carriage to pass between the plaintiff's horse and the other side of the road? If they were of opinion that there was, the plaintiff was entitled to recover.

Verdict for the plaintiff.

Scarlett and *Carr* for the plaintiff.

Erskine and *Espinasse* for the defendant.

Vide the case of *Ashton* v. *Heaven*, ante vol. 2, 533, where EYRE, Chief Justice, ruled, That where there were persons on the road, a person might choose where he would drive; and *Cruden* v. *Fentham*, *ib.* 685.

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SIMS *against* KITCHEN.

July 16th.

NOTICE in this case had been given to produce papers at the trial, which came on this day at seven o'clock in the evening preceding, at the office of Mr. *Blunt*, who was attorney for

for the defendant, at his chambers in the *Old Pay Office*, in *Broad Street*. It was delivered to a woman, who took care of the building; but who, it was proved, had received papers and orders for Mr. *Blunt*; but his dwelling-house was in *Queen Square*, at a considerable distance from his office.

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SIMS *against* KITCHEN.

Lord ELLENBOROUGH ruled, That this notice was too short to enable the opposite party to call for the production of the papers called for by the notice.

JAFFRAY *against* FREBAIN, WILSON, and BLACK.

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Same day.

In a joint action, where one defendant pleads infancy, the plaintiff cannot enter a *noli prosequi* as to him, and proceed against the others.

THIS was an action against the three defendants, as the proprietors of the *Glasgow* mail, to recover damages for an accident occasioned by the overturning of the mail coach, in which the plaintiff was a passenger.

The declaration was in *assumpsit*, "That the defendants, being owners of a certain coach, &c. undertook to carry the plaintiff safely," &c.

The defendant *Black* pleaded infancy; upon which the plaintiff entered a *noli prosequi* as to her.

The other defendants pleaded, That they, together with the said *Elizabeth Black*, did not undertake, &c.

The plaintiff having proved his case, the defendants' counsel contended, that the plaintiff should be nonsuited, on the authority of the case of *Chandler* v. *Parker* and Another, 3 *Espin.* Nisi Prius Cases, 76.; in which Lord KENYON had ruled, that the plaintiff could not so enter a *noli prosequi*, and go on against the others; but was bound to begin *de novo* against the other parties; so that the same point had been there decided.

The same arguments were urged as in that case: that the promise of an infant was not void, but voidable only; and that if the plaintiff had proceeded against the other defendants, without joining the infant, they could have pleaded in abatement.

Lord ELLENBOROUGH said, That he assented to the authority of that case; and nonsuited the plaintiff.

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Erskine, *Gibbs*, and *Marryatt* for the plaintiff.

Garrow and *Holroyd* for the defendant.

1803.

Same day.

GLASSCOTT *against* DAY.

Money tendered with a demand of a receipt in full, and refused on that ground, is not a legal tender; neither is it where the money is not in sight, but the witness supposed it was in a desk, and never produced, so that it does not appear that the party was willing, and if accepted, it could be immediately paid; the money should be at hand, and capable of immediate delivery.

ASSUMPSIT for work and labour, goods sold and delivered, &c.

Plea of *non assumpsit* as to all the money claimed, except as to 18*l.* 12*s.* and as to that sum a tender.

The plaintiff by his replication denied the tender and issue thereupon.

The sum claimed was 20*l.*

The witness for the defendant, who proved the tender, stated, That after the work had been done, he went to the plaintiff with the money, to what he estimated the value of the work; which he offered to pay on the plaintiff's giving him a receipt in full. The plaintiff refused to receive it. The next day, the plaintiff went to the defendant's counting-house to demand payment: the witness was there. He said he would go backward into the counting-house, and get the money out of the desk. The money was not in sight; but witness said he believed the money was there, and then in the desk: but the sum he meant to tender was the same as before, 18*l.* 12*s.*; and which he told to the plaintiff. The plaintiff refused to receive it, *as it was short of his demand. The witness then did not go for the money, or make any further offer of it.

[*49]

The plaintiff's counsel contended, that this was not a legal tender.

The counsel for the defendant, *e contra*, relied, That where the *quantum* of the demand was in dispute, and the plaintiff refuses to accept the sum which the defendant says he is about to offer, it dispenses with the actual offer of the money; and that it had been so decided: that that had been the case here; but that if there was any doubt as to that, as there was no replication of a subsequent demand and refusal, the defendant had a right to resort to the tender made the first day, which they contended was a legal and sufficient tender.

Lord ELLENBOROUGH. With respect to the point last made, as to the legality of the first tender, with a demand of a receipt in full, where the other party offers to receive the money in part, that is not a good tender in law. The money was first tendered under that condition, and was refused by the plaintiff. I do not think that the defendant can stand upon that, as to the supposed

tender

tender on the second day. If a man has the money about him, and offers to pay it to the plaintiff, who refuses it on account of its not being sufficient, as he has then a power to effectuate the offer, it is a good tender. If therefore the witness had the money in his possession on the second day, ready to pay to the plaintiff if he would accept it, the tender would be good; but when the witness says to the plaintiff, "I will pay you the money I offered you yesterday," and it does not appear where the money was, whether it was in the desk or not, so that the witness by opening could immediately get it, I think the tender is not good. It ought to appear that the money was there, and capable of immediate delivery.

1803.

GLASCOTT *against* DAY.

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Verdict for the plaintiff.

Garrow and —— for the plaintiff.

Gibbs and *Carr* for the defendant.

LUBBOCK *against* ROWCROFT.

July 16th.

THIS was an action on a policy of insurance, on twenty bags of pepper on board the ship *Nelly*, at and from *London* to *Naples*, *Leghorn*, or *Messina*, with liberty to touch at *Gibraltar*, or any other port in the *Mediterranean*.

In a case of insurance upon goods consigned to a particular port, on the arrival of the ship there, it is found to be in the hands of the enemy, that circumstance does not warrant the assured to abandon.

The goods were on the account of *Antonio Rizzati*, of *Messina*.

The plaintiff went for a total loss, under these circumstances: That the ship having arrived at *Minorca*, in the *Mediterranean*, it was found that *Messina* was in the hands of or blockaded by the *French*; in consequence of which he abandoned to the underwriters, and went for a total loss.

Lord ELLENBOROUGH, on the opening of the case, asked, If there was any precedent of such an action? and how the loss could be brought within any risque insured against?

Erskine, for the plaintiff, contended, That the action was maintainable: That the risque meant to be covered by the insurance, was not merely that the goods should not be lost or sunk in the sea, but that they should arrive at *Messina*, and come to the owner's use: That this was prevented, by the *French* having taken *Messina*; that was a restraint by the enemies of the country, which created an incapacity in the ship to perform the voyage, which was intended to be guarded against by the policy: That this was not merely *quiæ timet*, as if there were 100 *French* vessels covering the seas; in which case, though the probability was great of the ship's being captured, she might

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1803. escape; but here the port was in possession of the enemy, so that her capture was certain.

LUBBOCK *against* ROWCROFT. Lord ELLENBOROUGH said, That he still retained his first opinion: that the abandonment was from an apprehension of an enemy's capture; and not from any loss within the terms of the policy: That if such was allowed, every ship about to sail from the port of *London* for a port which had fallen into the hands of the *French*, might be abandoned; but he would suffer the cause to proceed.

It afterwards appeared, that in fact the bills of lading of the goods were sent to *Minorca*, where the goods were to be landed. The plaintiff was therefore nonsuited.

Erskine, *Park*, and *Giles* for the plaintiff.

Gibbs and *J. W. Warren* for the defendant.

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DUFFIELD *against* CREED.

July 17th. ASSUMPSIT on a note of hand of the defendant, dated *August*, 1782.

The note was dated from *Ashford*, in *Kent*, payable on demand, and at the house of *I. J.* and *W. Bulcock*, in *London*, seven days after sight. It was accepted by Messrs. *Bulcock*.

The defence relied upon was, That this note, in the year 1783, had been brought up to *London*, and paid by Messrs. *Bulcock*: That it had been lost, and by that means got into circulation again; and were prepared with evidence to that effect.

Lord ELLENBOROUGH said, That if this had been a bond, twenty years would have raised a presumption of payment; in which case he would have left the presumption of payment to the jury; and he thought, as this note was unaccounted for, the same rule of presumption of payment ought to apply.

Verdict for the defendant.

Garrow, *Gibbs*, and *Espinasse* for the plaintiff.

Erskine and *Marryatt* for the defendant.

July 19th.

ROBSON et alt. Assignees of BLAKEY, a Bankrupt, *against* KEMP et alt.

ASSUMPSIT by the plaintiffs assignees of a bankrupt, for money had and received, with the common money counts.

Where an attorney has come to the knowledge of a deed or instrument having been destroyed, from the circumstance of his being employed as an attorney, he cannot be asked as to the fact, the knowledge of which was so obtained.

Plea

1803.

ROBSON et alt. Assignees of BLAKEY, a Bankrupt, *against* KEMP, et alt.

Plea of *Non-assumpsit*.

The action was brought to recover the price of a cargo of coals belonging to the bankrupt, the value of which the defendants had received subsequent to an act of bankruptcy.

A clear act of bankruptcy was admitted to have been committed on the 26th day of *October*, 1801; but the counsel for the plaintiffs endeavoured to establish one prior to that, that is on the 12th of *October* of the same year.

This act of bankruptcy they endeavoured to establish to have been committed, by the bankrupt having made fraudulent conveyances to his son of a ship on that day.

They asserted, that there was no consideration for this conveyance; but that the son had executed to the father a warrant of attorney to the amount of the supposed value mentioned in the deed; and which, after the act of bankruptcy committed on the 26th of *October*, had been destroyed.

To prove this transaction, the plaintiffs' counsel called Mr. *Ashfield*, an attorney. He stated, that he was employed by both parties as their attorney, to prepare a warrant of attorney, the execution of which he had subscribed as a witness.

They were then proceeding to examine him as to the contents, and as to the execution of it, when the defendants' counsel objected to the witness's answering those questions, as having been acting as attorney; and that the parties had no right to call for the disclosure.

Lord ELLENBOROUGH. It is very settled law that an attorney is not bound to disclose facts communicated to him by his client; but if an attorney puts his name to an instrument as a witness he makes himself thereby a public man, and no longer clothed with the character of an attorney: his signature binds him to disclose all that passed at the time respecting the execution of the instrument; but not what took place in the concoction and preparation of the deed, or at any other time, and not connected with the execution of it: upon such matters he has a right to be silent. It has been said by the defendant's counsel, That no one has a right to call upon the attorney, except the party to whom it is executed; but I think otherwise; and am of opinion, that every person who claims an interest in the property, has a right to call upon the attorney, as being the attesting witness. [54]

The plaintiff's counsel were then proceeding to ask him as to the destruction of this warrant of attorney, by whom, and under what circumstances it was done.

1803.

ROBSON et alt. Assignees of BLAKEY, a Bankrupt, *against* KEMP, et alt.

Before he was permitted to answer, he was asked, by the defendant's counsel, If what he knew, concerning the destruction of the deed, had not been acquired from his having been called in by both parties as their attorney? He answered he had. Upon which it was objected: that he should not answer.

Gibbs contended, That the privilege of an attorney extended no further than to his being prevented from disclosing matters communicated to him by his client; but that what were facts, an attorney had always been bound to prove, whether he came to the knowledge of them one way or another.

[55] Lord ELLENBOROUGH. This is a transaction with which the party has only become acquainted from being employed as attorney. The act cannot be stripped of the confidence and communication as an attorney, the witness being then acting in that character. One sense is privileged as well as another. He cannot be said to be privileged as to what he hears, but not to what he sees, where the knowledge acquired as to both has been from his situation as an attorney. I therefore think, if the only knowledge he has, as to the destruction of this instrument, was acquired from the confidential communication made to him as an attorney, that he cannot be examined to it. I remember it once much canvassed here, Whether an attorney, in a case where a client, after a man had ceased to be his attorney, had made a communication to him as to a matter in which he had formerly been concerned for him, was bound to disclose it? Lord KENYON thought, that being no longer clothed with the character of attorney, he was bound to disclose it. If therefore he knew of the destruction of this instrument by any mode except from the circumstance of his being so concerned, he is bound to disclose it, but not otherwise.

Verdict for the plaintiff.

Gibbs, *Marryat*, and *Giles* for the plaintiff.

Erskine, *Park*, and *Cassells* for the defendant.

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HERTFORD SUMMER ASSIZES, CORAM LORD ELLENBOROUGH, CH. JUS.

July 27th.

STRUTT *against* BOVINGDON and Two others.

Where a witness, who had been examined as to a fact respecting a right, is deceased, what he swore at that trial may be proved by a witness who heard him give his evidence, and it is admissible.

THIS was a special action on a case.

The declaration contained several counts, in which the

plaintiff

plaintiff declared, That he being possessed of two mills, in the parish of *Rickmansworth*, to which the water had been used to flow, for the purpose of turning them: That the defendant had turned and diverted the water, had erected wears and other obstructions on the river; and had suffered the banks to be out of repair and in decay, so that great quantities of water had been wasted, and the plaintiff was deprived of the profits of his mills.

The plaintiff relied on his mills being ancient mills, to which the water had been accustomed to flow: That the defendant, who was the proprietor of the adjoining land to the mill-stream, had been used to water his meadows with water of the river; but that that was a qualified right, the mills having been erected before any wears or dams had been erected for the purpose of watering; and that it had been only used from *Saturday* night to *Monday* morning: whereas the defendant, who was the owner of the adjoining lands, claimed a right to turn the water, for the purpose of watering at all times. In the year 1784, the present plaintiff had brought another action against the defendant *Bovingdon*, for similar grievances complained of by the present declaration, &c. in which he had relied on the same rights as were claimed in the present action: That action came on to be tried at *Hertford*, in the year 1784, before Lord ROSSLYN, then Chief Justice of the Common Pleas; and a general verdict was found for the plaintiff.

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At that time the celebrated Mr. *Macklin* had been examined as a witness, as to his knowledge of the state of the place many years before. *Macklin* being dead, the counsel for the defendant proposed to give parol evidence by a person who had heard him give his evidence at the former trial, of what he then said; and deposed as his evidence on that trial.

This was opposed by the defendants' counsel, as giving in evidence what a third person had said; which was not legal evidence.

Lord ELLENBOROUGH said, He was of opinion, that it was admissible. It was not giving in evidence what a third person mentioned in an extra-judicial matter; but what he had said upon his oath as a witness, in a cause in which he had been examined: it came therefore before the jury in the present cause, under the sanction of an oath; and in that sacramental form in which evidence only was admissible: That he could not distinguish it in point of legal form and effect from depositions taken in *perpetuam rei memoriam*. Such depositions, if taken upon

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1803.

STRUTT *against* BOVINGDON and Two others.

oath, were at all times admissible. Mr. *Macklin*'s evidence might be considered as so given; and he should therefore admit it.

A witness was then called, who stated, That *Macklin* had been called at the former trial, in 1784: That he was sworn and examined as a witness; and then gave his evidence to the following effect:—That fifty years before, a Mr. *Fleetwood* had a house on the river side, where he used to accompany *Fleetwood* to fish; that the mill now occupied by the defendant then stood there; that the miller was very tenacious of the right of his water; and that *Fleetwood*, who wanted some water to bring into his garden, asked leave of the miller to do so: That he at first was unwilling; but afterwards gave him permission: That there was then no wear, no flake, nor any obstruction for the free passage of the water to the mills by any person.

Where a question of right of water has been tried, in an action on the case, the record of that trial is evidence in a second action against the same defendant, though there are other defendants, if they all claim under him.

The plaintiff's counsel then offered in evidence the record of the former trial; which they contended was conclusive, as to the rights claimed by the plaintiff by that action.

It was opposed by the defendants' counsel, First, On the ground that the parties were not the same: That that action was against the defendant *Bovingdon*, and another defendant not on this record; the present action was against him and others, who ought not to be prejudiced by a trial against *Bovingdon* only.

Lord ELLENBOROUGH said, That if this was a question of right, and the two defendants on this record justified under the defendant *Bovingdon*, * who was seised of the land, a verdict, though against *Bovingdon* only, was admissible.

[*59]

The fact was so in point of fact, and the objection on that ground over-ruled.

It was, secondly, objected, That from the nature of the action, the record was not evidence. It was an action for an injury: it had occurred since that for which the former action had been brought, and for which the plaintiff had recovered.

Lord ELLENBOROUGH said, The evidence was admissible. The question on that record was a question of right; and referring to the record, three of the counts in the former cause, and in the present, stating the right claimed by the plaintiff, and the obstruction by the defendant, were nearly in the same words; and the places where the obstruction was laid, particularly at *Ambury Bushes* and *Greenwickware*, were proved to be the same. The record of the former cause could not be deemed a legal *estoppel*, so as to conclude the rights of the parties by its production; but

it was binding so far, that he should think himself bound to tell the jury to consider it as conclusive of the rights of the parties.

Upon receiving this intimation of his lordship's opinion, the defendant's counsel consented to remove the obstructions at *Ambury Bushes* and *Greenwickware*; and the plaintiff took a verdict for nominal damages.

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STRUTT *against* BOVINGDON and Two others.

Shepherd, Serjt. *Garrow* and *Marryat* for the plaintiff.

Best, Serjt. and *Espinasse* for the defendants.

CURZON and another *against* LOMAX.

[60]

Same day.

To prove a right to the soil, acts of ownership exercised by one party, are conclusive evidence against a supposed title, from boundaries which have never been ascertained.

THIS was an action of trover for trees.

It was brought to try the right to a certain piece of land, called *Green Street*, which was claimed by the plaintiffs, as trustees for the Marchioness of *Sligo* and the Baroness *Howe*, as part of the waste of the manor called *Wild*. It was claimed by the defendant, as the waste of the manor of *Shenley-bury*, which belonged to him.

There was no evidence of any court having been held of the manor of *Wild*; but the plaintiffs produced an old deed of the date of 1657; in which it was described as a manor by that name. In the year 1718, a private act of parliament had passed, under which it had been sold to a Mr. *Mason*; from whose family it had passed to the late Earl *Howe*, father to the Marchioness of *Sligo* and the Baroness *Howe*.

It was objected; That this was not evidence; that the place called *Wild* was a manor.

Lord ELLENBOROUGH was of opinion, That the holding of courts was not necessary to shew that the place was a manor: it was sufficient if it was a manor by reputation.

To prove that the *locus in quo* belonged to the manor, the plaintiffs proved, That there were three fish-ponds in it; which fish-ponds had been often fished by those who were possessed of the manor of *Wild*, the waste of which it was reputed to be: That an ash-tree, which had stood on it, had been cut by Lord *Howe*'s orders in his lifetime, and taken away: That a person having dug some loam in *Green Street*, was stopped by Lord *Howe*'s directions; and that some mud, which had been dug out of one of the ponds, had been given by Lord *Howe* to one of the witnesses.

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The case intended to have been set up on the part of the defendant

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CURZON and Another *against* LOMAX.

defendant was, That the lord of the manor of *Shenley-bury* had lands held of his manor on both sides of the *locus in quo*, as well freehold as copyhold, which paid quit-rents to the manor: That the cattle of the inhabitants of *Shenley* commoned on *Green Street*, without interruption.

Lord ELLENBOROUGH asked, if the defendant could prove any act of ownership exercised by him, in respect of the soil? Being answered in the negative, he said, "That what was proposed to be given in evidence, was not an answer to the plaintiffs' case. The question in the cause respected the right to the soil. The right to the soil was evidenced by acts of ownership exercised on it; not by presumptive evidence of property arising from supposed boundaries, the rights to which have never been ascertained by possession. In this case, every act of ownership that could be exercised had been done: the ponds had been fished, persons had been prevented from taking the soil, and a tree had been felled. That evidence of actual ownership must prevail against supposed unexercised rights.

Verdict for the plaintiffs.

Garrow and *Marryat* for the plaintiffs.

Shepherd, Serjt. and *Espinasse* for the defendant.

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CHELMSFORD SUMMER ASSIZES, CORAM HOTHAM, BARON.

REX *against* WALFORD.

Felony cannot be committed in stealing oysters off oyster-lays, in an arm of the sea, though not produced there, but brought for sale.

THIS was an indictment against the defendant.

The indictment charged, That the defendant feloniously stole half a peck of oysters of a certain laying of the plaintiff's, situated at *Tollesfleet*, in the county of *Essex*.

The prosecutor of the indictment was the proprietor of certain oyster-beds or layings, on the coast of *Essex*. Those beds are considered as private property: they are copyholds; and the proprietors are rated to the poor, and all other assessments within the parish. They are allotted out among different proprietors; and their respective beds are marked by beacons or long poles put into the ground; but they are all in an arm of the sea, and covered with the salt water; and the water there is navigable.

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REX *against* WALFORD.

The oysters are laid on these layings previous to their being put on the beds to fatten: they are caught in different parts of the coast and creeks, and purchased by the proprietors, for the purpose of being afterwards carried to the beds; very few, if any, being produced on the layings.

Garrow, for the defendant, objected: That this indictment could not, in point of law, be sustained: That either as to the place where the larceny was committed, or that which was the subject of it, the indictment could not be supported: That the place where they are laid was an arm of the sea, where all the King's subjects had a right to fish: That oysters were of that description, that felony could not be committed in the stealing; but that above all, the legislature had, by a statute in 31 *George* III. *c.* 51, declared that this offence was a misdemeanour only: That after that construction of the legislature, the offence could never be construed to be felony. [63]

It was admitted by the prosecutor's counsel, That larceny could not be committed unless of personal chattels, and not that which was *feræ naturæ*; but they contended, that the oysters here were not the natural produce of the place, but were brought from different parts of the coast, where they were produced, at the expense of the proprietor, and laid on the beds for the purpose of being fattened, and improved for sale; so that there was as distinct a property in them as in any other chattel: That as to the place being an arm of the sea, where all the King's subjects had a right to fish, in fact, the several proprietors had a distinct and several property in the oyster lays, marked out and distinguished by posts and boundary marks: That they were held of the adjoining manor, and were rated to the poor for them; and though it was admitted, that the act of parliament had declared the offence to be a misdemeanour, that did not prevent the party injured from proceeding for a felony, the remedy being cumulative. [64]

Mr. Baron HOTHAM ruled, That the statute 31 *Geo.* III. *c.* 51. having made the offence a misdemeanour only, had negatived the idea of a felony. He said, he had taken the opinion of some of the other Judges on the point, who were of that opinion: he therefore ordered the defendant to be acquitted.

Trower and *Espinasse* for the prosecution.

Garrow and *Marryat* for the defendant.

CASES

CASES

ARGUED AND RULED

AT

1803.

NISI PRIUS,

IN

MICHAELMAS TERM, 43 GEO. III.

SITTINGS BEFORE MICHAELMAS TERM.

Nov. 1st.

HAYMAN *against* MOLTON, KIRBY, et alt.

In cases of extreme necessity, and where a ship having got aground, cannot, in the opinion of persons competent to judge, be raised, the captain may sell her for the the benefit of the owners; but it can only be in cases of extreme necessity: and the survey, &c. must be made on the best information, and with the most pure good faith.

[*66]

THIS was an action of trover, for the ship *Grace*.

The plaintiff brought his action to recover the value of that ship, he claiming title as the owner. On the part of the defendants, antecedent ownership in the plaintiff was admitted; and the only doubt in the case was, whether that property was not at an end, by virtue of the transfer of the property by what is called *A Colonial Transfer?* that is, by a sale in *Jamaica*, under the particular circumstances following, and under which the defendants claimed:

The ship had been built in 1799, and went on a voyage to *Jamaica;* at which time the plaintiff was the owner. After her arrival there, she got aground, and sustained some damage.

On the part of the plaintiff it was suggested, that, with a fraudulent view of obtaining the ship, * it was pretended, that she could not be got off; and in consequence a survey was taken; which was represented by the plaintiff to be a mock-ceremony, by the persons called in to make the survey not being properly chosen; and who had decided, that she had sustained so much injury, that she should be sold for the benefit of the owners: that she was accordingly put up, and sold by auction; and bought by one *Dunn*, who sold her to one *R. Molton*, by whom she was sold to the other defendant.

The plaintiff contended, that there was no fair transfer of the property, the transaction being fraudulent: that *Kirby*, one of the

the defendants, had been one of the persons employed on the survey: that she had not bilged then, though it was so stated in the survey; but was readily got off, and sailed soon after for *England*; and performed that voyage in safety: that one *Cunningham* acted as auctioneer; and, without any authority, had undertaken to conduct the sale for the plaintiff; and which sale, with a view to effect a fraudulent transfer, had taken place before the time advertised, which was contended to be fraudulent and void.

Erskine, for the defendant, contended, that what was done, was done by the authority of the captain: that the ship was in fact a wreck; and he contended, as a matter of law, that the captain had a virtual authority from the owners of a ship, under such circumstances, to sell what remained of her. He did not contend for an unqualified power in the captain to sell under every circumstance; but, in the present case, he admitted, that [67] though the vessel was aground, yet if she was easily, in the opinion of sailors, got off, it would be evidence of fraud in the purchase, if bought as a wreck: but he stated, he would shew that it was extremely doubtful whether it would be practicable or not; and that it was attended with much risque and expense; and that the captain was therefore well warranted in law in the step he had taken.

Lord ELLENBOROUGH. A captain of a ship has by law a right to hypothecate her in a foreign country, for the purpose of raising money for her necessary repairs; but he has no such general authority by law as to sell. The case of *Tremenhere* v. *Tresilian*, from *Sid.* 453, had been cited to that effect; and no doubt the law is so: but there are circumstances arising in consequence of the increase in our commercial transactions, that may admit some extension of that rule of law. Where a case of urgent necessity and extraordinary difficulty occurs, where a ship has received irremediable injury, I am disposed to go as far as I can to support what has been contended for by Mr. *Erskine*, that under such circumstances, the captain, acting *bonâ fide* and for the benefit of the owners, might sell the ship for the benefit of his owners. This is the disposition of my mind; but I cannot lay it down as positive law. At all events, it can only be justified by extreme necessity and the most pure good faith; that is, if the vessel is in such a state as it would be probable the owners themselves, if on the spot, would have acted in the same way as the captain has done, and have sold the ship. [68]

I shall

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HAYMAN *against* MOLTON, KIRBY, et alt.

I shall therefore leave it to the jury to say, whether in this case, there existed such a necessity as called upon the captain, acting *for the benefit of his owners, to sell the ship?* and if there did, *whether this was a fair sale, and unmixed with any fraud? It* appears that a survey has been made; but there is no evidence that the captain ever made any attempt to raise the vessel. He should have applied to the agent for the ship, and endeavoured to have procured money for the purpose. If all means of this sort failed, the necessity of selling would have been more pressing; and I think the captain should have done so. With respect to fraud in the sale, I must observe on this case, what deserves much reprehension: a survey has been made; and some of those who made the survey have become the purchasers. I think such conduct highly improper. A court of equity will not allow a trustee to become a purchaser of property of which he is trustee: such jealousy does a court of equity entertain of a man's availing himself of information obtained by means of his situation. It would be a useful lesson to persons circumstanced as they are here; they should make their election either to be surveyors or purchasers; but they should not be both, by which they are in a situation unfairly to avail themselves of information they have obtained as surveyors.

Verdict for the plaintiff.

Garrow and *Marryat* for the plaintiff.

Erskine, *Gibbs*, and *Giles* for the defendant.

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Nov. 2d.

HILDYARD *against* BLOWERS.

Where money has been paid into court, short of the plaintiff's demand, and it is taken out of court, it is admissible evidence to shew *quo animo* it was done; and it is not to be taken as an admission that the rest of the demand was unfounded.

THIS was an action on the statute, for selling five chaldrons of coals as and for wharf or full measure, and delivering them short by sixteen bushels.

The defendant was a dealer in coals, and had sold the coals in question to the plaintiff. He had brought an action for the price of the coals against the present plaintiff, who paid money into court to the value of the coals less by the value of sixteen bushels; which the plaintiff relied upon as a deficient delivery. The defendant took the money out of court, and had his costs.

This was urged by the plaintiff as an admission of the short delivery, and as conclusive evidence to sustain the present action.

Lord ELLENBOROUGH said, as the act of taking the money out of court was the act of the attorney, and of an equivocal aspect, he would

would suffer the attorney for the present defendant, to give evidence as to the taking the money out of court, which had been so paid in, with the deduction; and to explain what was the motive for it. *He was admitted to state the advice which had been given to his client, as to taking that step; which was, that he had taken the money out of court merely to avoid litigation, the sum in dispute being so small,—and not as admitting that there had been a defective delivery.*

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HILDYARD *against* BLOWERS.

Verdict for the defendant. [70]

Gibbs and *Comyn* for the plaintiff.

Erskine, *Garrow*, and *Espinasse* for the defendant.

DAVEY *against* LOWE.

Nov. 8d.

THIS was a special action on the case, against the defendant, as one of the deputy coal-meters of the city of *London*, for improper conduct and negligence in his office, in suffering coals to be delivered out of a ship short of measure.

Where, in a declaration, the defendant is described as a meter for the superintending the delivery of coals, his being a deputy coal-meter satisfies that averment.

The declaration stated, "that the defendant, being one of the meters duly appointed to measure and superintend the delivery of coals from ships in the river *Thames*, &c. had," &c. [stating the offence.]

To prove the appointment of the defendant, a witness was called from the principal coal-meter's office. He produced a book, in which was an entry, in the form of a petition to the Lord Mayor and Board of Aldermen, to the following effect:—"the fifteen principal coal-meters of this city, present unto this court *Thomas Gearing*, *Joseph Lowe* [the defendant] and others (naming them) being all freemen of this city, and of the fellowship of porters, to be sworn their deputies as usual."

An entry was then made, that *Gearing*, *Lowe* [the defendant] and the rest were appointed by the master coal-meters; and that they were that day severally sworn in the Lord Mayor's Court, [71] *London*, to the due execution of their said several offices.—Dated Coal-meters' Office, *London*, the 2d of *February*, 1797.

It was admitted, that there were fifteen principal coal-meters, each of whom had a deputy; and that the defendant was one of the latter.

Gibbs, for the defendant, objected: that there was a variance between the evidence and the description of the defendant in the declaration: that he was described in the declaration as one of the

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DAVEY *against* LOWE.

the meters duly appointed to measure and superintend the delivery of coals: that the defendant was not one of the meters duly appointed: these were the fifteen appointed by the city of *London*. The defendant was a deputy only, not appointed by the city, but merely approved of.

It was answered by the plaintiff's counsel, that there were two descriptions of meters, the principal coal-meters and the deputy coal-meters: that the defendant was not described as a principal coal-meter, but merely as a meter. He did answer that description: he was a meter; and he was sworn to discharge the office.

Lord ELLENBOROUGH. The first impression of my mind was in favour of the objection. The word "appointed" struck me, that the defendant could not be said to be appointed; but now I think otherwise. There are two description of meters. The declaration describes the defendant as a meter: he certainly is so appointed to measure coals. The declaration does not say,
[72] "appointed by the city of *London*," or in any particular way. The entry in the book of the city is, that "being appointed by the principal coal-meters to do his duty." This, in my opinion, satisfies the description in the declaration.

Gibbs asked, and had the point reserved.

Erskine, *Garrow*, and *Lawes* for the plaintiff.

Gibbs, *Park*, and *Richardson* for the defendant.

I believe it never was afterwards moved.

SITTING-DAY AFTER TERM AT GUILDHALL.

Nov. 30th. Where a principal employs an agent or servant to sell for him, what such agent says as a warranty or representation at the time of the sale, respecting the thing sold, is evidence against the principal; but not what he has said at another time.

HELYEAR *against* HAWKE.

THIS was an action of *assumpsit*, on the warranty of a horse, sold by the defendant to the plaintiff.

Plea of the general issue.

The warranty was, "that the horse was seven years old, and free from vice." This was so stated in the declaration.

The horse had been sent to be sold at *Tattersall's*; had been inserted in his catalogue as a horse to be sold; and was described, in that catalogue, as seven years. He had however not been brought to the hammer; but had been sold by private contract to the plaintiff, by the defendant's groom, * before the day of sale by auction; and on the warranty made by the groom the action was founded.

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The

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HELYEAR *against* HAWKE.

The defendant denied his having given any warranty whatever, except of his soundness.

The evidence on the part of the plaintiff, as to the warranty, as stated in the declaration, was, that he having *Tattersall*'s catalogue in his hand, went to the defendant's groom, who was then at *Tattersall*'s taking care of his master's horse. He had the horse brought out; and asked the groom, if he was but seven years old? He said, yes.—If he was free from vice? The groom said, yes; he is, if you have him. The horse was then led back. The witness heard nothing said about the price at that time; but the horse was soon after delivered.

In the course of this evidence, *Erskine*, for the defendant, made several objections. He first objected, that the declarations of the groom, as to the age or qualities of the horse, which amounted to a warranty, were not admissible to charge the master: that it was necessary, before the master was bound by his act, to make him the accredited agent of the master; and that even when he was so constituted, what he said could not be given in evidence; and that to prove it, he should be called himself.

Gibbs, of counsel for the plaintiff, admitted, that he must be constituted the accredited agent of his master, before the master could be in any way bound; but he contended, that the rule, as to the inadmissibility of his declarations, applied to cases of declarations made not at the time of the transaction, but at another, and unconnected with the fact of the sale: that the defendant had constituted him his agent, by sending him with the horse to *Tattersall*'s, and authorizing him to give the representation stated in *Tattersall*'s catalogue, and confirmed by a letter from the defendant, which he could produce. [74]

Lord ELLENBOROUGH. If the servant is sent with the horse by his master, and which horse is offered for sale, and gives the direction respecting his sale, I think he thereby becomes the accredited agent of his master; and what he has said at the time of the sale, as part of the transaction of selling, respecting the horse, isevidence; but an acknowledgement to that effect, made at another time, is not so: it must be confined to the time of the actual sale, when he was acting for his master.

The evidence of what passed between the plaintiff and the defendant's servant at the time of the sale, proved only the conversation first stated; but nothing was said about the price.

Lord ELLENBOROUGH was of opinion, that as nothing was then

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then said about the price, it could not be deemed a complete contract for the sale of the horse, or constitute a warranty made by the agent at the time of the sale, it therefore became necessary to call for the letter.

It was in these words:

"Sir,

"I understand, from my groom, that the chesnut gelding he sold yesterday belonging to me, is returned by the gentleman [75] who bought him as seventeen years old. This I have nothing to do with; and shall not enter into the merits of the question. I bought him as a seven years old gelding of Mr. *Clowes*, a *Lancashire* gentleman; and ordered my groom to warrant him sound, which he is. As to his age I neither know nor care; nor shall I take him back. The gentleman who bought him has a receipt; if his age is mentioned in it as seven years old, and he can prove that he is more, I will take him back: if his age is not mentioned, I have nothing more to say.

Your obedient servant,

MARTIN HAWKE."

Upon this letter being read, *Erskine* contended, that it did not give a general agency to the servant to warrant him seven years old; but merely that he was sound: that the servant being therefore but a special agent, and having exceeded his authority, the master was not bound.

It was answered, that it had been decided, if a master entrusts a servant to sell, that, even if he exceeds his authority, the master is bound.

Lord ELLENBOROUGH. I think, the master having entrusted the servant to sell, he is entrusted to do all that he can to effectuate the sale; and if he does exceed his authority in so doing, he binds his master; but from that letter, there was no admission of the warranty, as stated in the pleadings. The plaintiff must go farther.

The plaintiff was under the necessity of calling the defendant's [76] servant; who proved, that there was no warranty; but that the horse was to be taken with all faults. The plaintiff was therefore nonsuited.

Gibbs and *Espinasse* for the plaintiff.

Erskine for the defendant.

SITTINGS AFTER TERM AT WESTMINSTER.

RUSBY *against* SCARLETT, ESQ.

Dec. 2d.

The master is discharged from the payment of debts contracted by his servant, where he gives the servant money before-hand to pay for goods; but not where he authorizes the servant to take up goods, and gives him money to pay, if the servant embezzles the money.

THIS was an action for goods sold and delivered.

Plea of *Non-assumpsit*.

The plaintiff was a corn-chandler. The action was brought to recover the price of a quantity of hay and straw, sold by the plaintiff, for the use of the defendant's horses. The plaintiff proved the delivery of a quantity at the defendant's stables, and the delivery of bills of parcels; but there was no evidence of his having ever seen the defendant, or of his having ever received any orders from him whatever, or that he ever received from him directly any payment or money whatever.

The defence was, that the defendant had given money to his coachman to pay the bills, which he had embezzled. It appeared that the defendant had kept a book with the servant; in which were entered the articles procured by the servant, and the sums advanced to him; but there did not appear to be any connection between the sums advanced to the servant and the demands which he was to pay; but the money was advanced generally.

Gibbs, for the plaintiff. This is not a case where the master has given the servant money to go to market with. The servant has had money at different times; bills of parcels were sent; and the defendant has settled, at different times, without calling for vouchers of the payment; this he ought to have done. He has assented to credit; and he contended, that the law as relied upon, only applied to cases where the master gave the servant money specifically to pay for the goods.

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Lord ELLENBOROUGH. The general rule to subject the principal to the act of the agent is this, the agency must be antecedently given, or be subsequently adopted. There must, in the latter case, be some act of recognition; but if I authorize a man to obtain credit on my account, and he gets the goods on such credit, unless I have paid him, I am myself liable: but I go further, for if the goods were taken up, and the money given afterwards to the servant to pay, I am inclined to think the master liable, if the servant has not paid over the money; for he has given the servant authority to take up goods on credit. It

is

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RUSBY *against* SCARLETT, Esq.

is therefore material to see when the money was given. If the servant was always in cash before-hand, to pay for the goods, the master is not liable, as he never authorized him to pledge his credit; but if the servant was not so in cash, he gave him a right to take up the goods on credit; and I think he would be liable, as the servant has not paid the plaintiff, though he might have received the money from the defendant, his master.

Verdict for the plaintiff.

Gibbs and *Lockhart* for the plaintiff.

Erskine and *Garrow* for the defendant.

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PARSLOW *against* DEARLOVE.

Dec. 3d.

The statute 7 *Geo.* I. *c.* 31. allowing debts due at a future time to be proved under a commission of bankruptcy, applies to written securities only.

THIS was an action of *assumpsit*.

The defendant pleaded as to all the premises and undertakings, except as to 36*l.* 16*s.* *Non-assumpsit*; and as to that sum, that he became a bankrupt before the cause of action accrued.

The action was brought to recover a sum claimed by the plaintiff, who was a schoolmaster, for half a year's schooling of the defendant's sons. The half-year ended on the 24th of *June*, 1801.

On the 20th of that month, the defendant became a bankrupt. It appeared in evidence, that the bills for schooling were made out half-yearly, at *Midsummer* and *Christmas*. The boys had been taken away on the 18th of *June*. The plaintiff's counsel proved, that the half-year ended on the 24th, up to which time all the bills were made out; and he contended, that the debt did not accrue and become due until the 24th; and the defendant having become a bankrupt on the 20th, the debt accrued subsequent to the bankruptcy; and was therefore not discharged by the certificate.

It was on the other side contended, for the defendant, that, under the statute 7 *Geo.* I. *c.* 31., the debt was proveable under the commission: that the debt was due on the 18th, before the commission, though not payable till the 24th: that at all events, it was proveable under the statute, being *debitum in presenti solvendum in futuro*; and the cases of *Henbest* v. *Brown*, *Peak*'s N. P. Cases, 54, was cited; where Lord KENYON had ruled,

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that a debt for goods sold, and due at the time of the commission, was sufficient to support the commission, and was within the

the statute. *Cochran* v. *Love*, *Co. B. L.* 18, was also cited as in point.

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PARSLOW *against* DEARLOVE.

Lord ELLENBOROUGH said, he thought the debt was not of that description, which could be proved under the commission. His lordship turned to the act of parliament, which he observed spoke of "bills, bonds, promissory notes, and other personal securities, for money payable at future days; and allowed persons having *such securities*, not then due, to come in under the commission of bankruptcy." The act seemed therefore to be meant to be confined to written securities only, and that was his opinion; and he therefore held the certificate of the defendant to be no bar.

Verdict for the plaintiff.

Erskine and *Manley* for the plaintiff.

Park and *Espinasse* for the defendant.

In the next term, the Court of *King's Bench* was moved to set the nonsuit aside; but the Court agreed with the Lord Chief Justice. *Vide* 4 *East*, 438, S. P.

FRICKER *against* FRENCH.

Same day.

ASSUMPSIT for goods sold, and work and labour, with the other common counts.

Plea of *Non-assumpsit*.

In an action for a tradesman's bill, where the work has been done by several persons under him, any of the workmen called may be asked as to the particular sums which they received.

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The action was brought to recover the sum of *16*l.* for the papering and ornamenting certain rooms of the defendant.

The demand was contested, on the ground of overcharge: the sum of —*l.* having been paid into Court.

A witness was called, who was by profession an artist and ornamenter of rooms: he had done the work for the plaintiff, who had paid him for it.

The work consisted of ornamental paintings, in a very expensive style. The room was decorated with pilasters, and in compartments with festoons of flowers.

The witness said, That the festoons were painted by one *Fugalett*, who was employed under him.

The defendant's counsel asked him, What sum he had paid to *Fugalett* for the part which he performed?

Garrow objected to this question: he stated that Lord KENYON had said, That the profits of tradesmen ought not to become the subject of investigation: That the matter in dispute was, What the whole was worth when finished?

1803.

FRICKER *against* FRENCH.

Lord ELLENBOROUGH said, He thought the question might be asked. The demand was composed of the expense of the materials; the skill and other expenses incurred and paid on account of them. It was therefore perfectly unobjectionable to.

The witness was accordingly examined.

Verdict for the plaintiff.

Garrow and *Lawes* for the plaintiff.

Erskine and *Ch. Warren* for the defendant.

[81]

Same day.

BRYAN *against* HORSEMAN.

In assumpsit for a debt above six years standing, and statute of limitations pleaded, if a party says, He has no recollection of the debt, but relies on the statute, the bar is good. *Aliter*, If he in any way admits that it was unpaid.

ASSUMPSIT for goods sold, with the common counts. Plea of *Non-assumpsit* and the Statute of Limitations.

The action was brought to recover the value of a quantity of wheat, sold by the plaintiff to the defendant, more than six years before the commencement of the action.

On the part of the plaintiff, the evidence to establish a new promise, the sale having taken place more than six years before, was, That of the sheriff's officer, who had made the arrest.

His evidence was, That the defendant, when he was arrested, was asked by the officer, If he meant to pay the debt? The defendant answered, "I do not consider myself as owing *Bryan* (the plaintiff) any thing, as it is over six years since the debt was contracted. I acknowledge having had the wheat; but I have paid part, and 26*l.* only remains due."

The defendant's counsel contended, That this did not amount to a promise sufficient to take the case out of the statute.

Lord ELLENBOROUGH. I am not willing to narrow the effect of this statute: it was meant to protect persons who might have lost their vouchers from loss of time, or have otherwise been deprived of their evidence: it is a shield which the law has put into the hands of the defendant to protect himself; but he must use it, and not throw it away. If therefore the defendant says, on being applied to for the money, "I have no recollection whether it was paid or not; but I think it was: I rely on the statute; it is six years since," that shall protect him against the debt; but if there is any acknowledgment that the debt is then due, I think the acknowledgment of the debt being then subsisting, raises a promise to pay, grounded on his antecedent liability. He does not rely upon the presumption of payment, which the law would raise for him. Here the defendant has made

[82]

made such acknowledgment. The course of the cases has held, that this takes the case out of the statute; and I shall so direct the jury; but give the defendant's counsel leave to move it, if he thinks it fit to move. 1803. BRYAN *against* HORSEMAN.

There was a verdict for the plaintiff, with liberty given to the defendant's counsel to move to set the verdict aside.

Garrow and *Wigley* for the plaintiff.

Park and *Bosanquet* for the defendant.

In the next term this case was moved; and the Court concurred with the Chief Justice.

SITTINGS AFTER TERM AT GUILDHALL, IN THE COMMON PLEAS. [83]

CLEMENT *against* GUNHOUSE. *Dec.* 11th.

In an action of assumpsit for sailors' wages, though the plaintiff signed articles, and they are produced under seal, the plaintiff shall not be nonsuited, it appearing that he did not mean to contract by deed, the words being, "to which the parties have set their hands," without saying "seals."

THIS was an action of *assumpsit*, brought to recover the amount of wages claimed by the plaintiff, as a sailor on board of a ship commanded by the defendant.

The declaration was generally for work and labour as a sailor.

The plaintiff proved the service on board by the evidence of a sailor, who had served on board the same ship. He was asked, If he and the plaintiff had not signed articles? He answered in the affirmative. Upon which they were produced by the defendant's attorney. They were signed by each of the parties, but had a seal after each name.

Upon this the defendant's counsel objected: That the plaintiff should be nonsuited, as the plaintiff should have declared on the deed.

Mr. Justice CHAMBRE, before whom the cause was tried, asked for the ship's articles. His Lordship having perused them, said, He was of opinion that the objection could not be sustained. The putting a seal opposite to the name, though evidence of a deed, and one of the formalities belonging to it, was not to be taken as conclusive. If the parties did not mean to contract by deed, the ignorance of the parties as to the effect of a seal, could not make it so. Here the words of the articles are, "To which the parties have set their hands," not seals. It was therefore not the intention of any of the parties to execute a deed. He therefore should hold it to be not sufficient to nonsuit the plaintiff. [84]

1803.

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inst
OUSE.

The plaintiff had a verdict.
Cockell, Serjt. and *Alley* for the plaintiff.
Shepherd, Serjt. for the defendant.

ELSWORTH, Executor of ———, *against* WOOLMORE and another.

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THIS was an action of *assumpsit* for work and labour.

The action was brought to recover a sum of money claimed by the plaintiff, and which is termed *Gratuity Wages;* to which the intestate was stated to have been entitled as sail-maker on board the *Admiral Gardiner* East India ship, of which the defendant was the owner.

The defendants were the owners of the India ship *Admiral Gardiner:* the deceased, in the year 1797, engaged on board her. He signed articles, which were produced. In the articles he was described as sail-maker.

[55] The case which the plaintiff proposed to prove was, That the sum of 2*l.* per month, claimed by him, was, by the settled usage of the East India Company's ships, allowed to a certain description of persons sailing on board the India ships; such as the boatswain, painter, and sail-maker: That exclusive of this general custom and usage, *Woolmore*, the defendant, who was ship's husband, had promised to pay the deceased that sum of money.

It was admitted, that the wages of 2*l.* 10*s.* per month, mentioned in the articles, had been paid.

Best, Serjt. for the defendant, objected: That the action was not maintainable. He read the words of the statute, 2 *Geo.* II. *c.* 3. By the first section it is enacted, "That it shall not be lawful for any master or commander of any ship or vessel, bound to parts beyond the seas, to carry any seaman or mariner, except his apprentice or apprentices, to sea from any port, or where he or they were entered or shipped, to proceed on any voyage to parts beyond the seas, without first coming to an agreement or contract with such seamen or mariners for their wages; which agreement or agreements shall be made in writing, declaring what wages each seaman or mariner is to have respectively, during the whole voyage, or for so long time as he or they shall ship themselves for; and also to express in the said agreement or contract the voyage for which such seaman or mariner was shipped to perform the same; and in case any master or commander

mander of any ship or vessel, shall carry out any seaman or mariner, except his apprentice or apprentices, upon any voyage to parts beyond the seas, * without first entering into such agreement or contract as aforesaid, and he or they signing the same, such master or commander shall forfeit and pay the sum of five pounds for every such seaman or mariner which he shall carry to sea, without entering into such agreement in writing as aforesaid, to the use of *Greenwich* Hospital.

By another section of stat. 2 *Geo.* II. *c.* 3. "It is further enacted, That if any seaman or mariner enter or ship himself on board any merchant ship or vessel, on any intended voyage for parts beyond the seas, he or they so entering themselves as aforesaid, shall, and they are hereby obliged to sign such agreement or contract, within three days after he or they shall have entered themselves on board any ship or vessel, in order to proceed on any voyage as aforesaid; which agreement or agreements, or contracts, after the signing thereof, shall be conclusive and binding to all parties, for and during the time or times so agreed or contracted for to all intents and purposes, any custom or usage to the contrary in anywise notwithstanding."

He then contended, That under this act no action could be maintained for sailors' wages, unless they were entered into under articles: That the contract being in writing, no sum could be recovered beyond that for which the articles were subscribed: That the policy of the act would be evaded, if by a sub-contract the sailor was allowed to reserve to himself more than the articles gave him.

On the other side, the plaintiff's counsel insisted, That there was nothing inconsistent with the policy of the act to allow this, which the established usage of the trade had allowed, not to the seaman, as such sailor or mariner, as described in the articles, the deceased having been in a different situation, that of sail-maker; and that the act applied to the crew as consisting of sailors only: That in this case there were two contracts: the one with the East India Company, for the wages reserved by the articles; these were paid by the East India Company: but that this money claimed by this action was on a contract with the owners, and independent of the wages.

Lord ALVANLEY said, He was clearly of opinion that the plaintiff should be nonsuited: That the act was express, requiring in terms that articles should be signed by the sailors: That it would be a fraud on the rest of the crew, if the owners

were

1803.

ELSWORTH, Executor of— *against* WOOLMORE and another.

were permitted by a private contract to give more wages to one than to another: he therefore was of opinion, that there could not be two legal contracts; that the only one allowed was that entered into by articles, and signed by him.

The plaintiff was nonsuited.

Shepherd, Serjt. and *Espinasse* for the plaintiff.

Best, Serjt. and *Pell* for the defendant.

] SITTINGS AFTER TERM AT GUILDHALL, IN THE KING'S BENCH.

Dec. 15th.

THOMAS and others *against* FOYLE.

To establish the fact of a person being the owner of a ship, evidence of his having ordered and paid for stores for her, is *prima facie* sufficient.

THIS was an action on a policy of insurance, underwritten by the defendant for 100*l*. It was effected on the ship *Speculation*, on a voyage from *Ipswich* to *Chester*.

Loss by capture.

The policy was on the ship: it was dated the 24th of *January*, 1801; and was effected by the plaintiffs, as agents to one *Marsh*; in whom, in the declaration, the interest was averred to be.

The fact of ownership being in *Marsh*, was disputed by the defendant.

To prove the ownership to be in *Marsh*, the plaintiff called the several persons who had supplied the ship with different articles, as blocks, stores, &c. and other articles for the use of the ship there. It was proved that they were put down to *Marsh*: that he was made debtor for them, and actually paid for them to the different persons by whom they were furnished.

Marsh was also called as a witness, to prove the fact of the property being in himself (he having been a bankrupt, obtained his certificate, and released); he stated, That the ship was his; but being asked, How he had come entitled to the property in

[89] the ship? and, Whether it was not by bill of sale? He answered in the affirmative: that he had so become entitled.

The plaintiffs having rested their proof of ownership there,

Gibbs objected: That the plaintiff had not made out his case: That the witness had stated his title to be under a bill of sale, which was in writing: That the bill of sale should be produced; and that he should not be allowed so to prove it by parol.

Lord ELLENBOROUGH ruled, That it was sufficient evidence

of

1803.

THOMAS and Others *against* FOYLE.

of ownership in *Marsh*, to enable the plaintiff to sustain the action; and to entitle them, unless contrary proof was offered, to recover: That the paying for the several articles for the ship in that manner, could not be presumed to be done by a stranger, or by one unconnected with the ship; and as proved, was sufficient evidence of ownership; sufficient at least to entitle the plaintiff to rest on that proof of ownership; and though it had been proved that the witness *Marsh* had purchased the vessel by a writing, that should only have the effect of letting the defendant into proof of the actual state of the title as so derived.

Verdict for the plaintiff.

Erskine and *Giles* for the plaintiff.

Gibbs and *Marryat* for the defendant.

[90]

Saturday, *Dec.* 17th.

PEARSON *against* FLETCHER.

Where bankruptcy is pleaded, the date of the commission, if it is subsequent to the date of the debt sued for, shall be sufficient for the defendant to rely on, at least sufficient to entitle the defendant to call on the plaintiff to prove an antecedent act of bankruptcy.

ASSUMPSIT on a bill of exchange, for 569*l.* drawn by *Marsh* on the defendant, and accepted by him, dated the 25th of *February*, 1800, at six months, and indorsed to the plaintiff.

The defendant pleaded, first, *Non-assumpsit*; secondly, bankruptcy.

The plaintiff proved the indorsement by the payee to him, and the acceptance by the defendant; and there rested his case.

The defendant produced his certificate. The commission was sued out the 19th of *June*, 1800; and the certificate was dated in *January*, 1801: and then relied, that as it appeared to bear date subsequent to the date of the bill, the certificate was a complete bar.

The plaintiff's counsel contended, that it was incumbent on the defendant to prove an act of bankruptcy subsequent to the date of the note: that the plea averred, that the several causes of action accrued prior to the bankruptcy: that the plaintiff having fixed a date by the bill, it was necessary for the defendant to answer that time, by shewing an act of bankruptcy subsequent to it.

For the defendant, his counsel insisted, that the plea being given by the statute, was to supersede the necessity of going through the evidence of all the steps of the bankruptcy; and of course of the act of bankruptcy: that it must be therefore taken to have been an act of bankruptcy at the time of the suing out of the commission, which was on the 19th of *June*, [91]

1803.

PEARSON *against* FLETCHER.

and subsequent to the date of the bill; which was sufficient to protect the defendant.

Lord ELLENBOROUGH, after expressing some doubt at first, said, that he was of opinion, if the plaintiff meant that the certificate should be no bar, it was incumbent on him to shew an act of bankruptcy committed by the defendant, which preceded the debt in question; that he must take the fact to be, that the defendant was a bankrupt at the time of the date of the commission, which was subsequent to the date of the note, and which could therefore have been proved under it.

But when the proceedings are produced, the act of bankruptcy found under the proceedings shall be sufficient for the plaintiff without proof of an actual act of bankruptcy.

Upon this being so ruled by the Lord Chief Justice, the plaintiff's counsel called upon the solicitor under the commission, to produce the proceedings.

The defendant's counsel objected to it; and the solicitor, who had a *subpœna duces tecum*, referred to Lord ELLENBOROUGH for his direction.

Lord ELLENBOROUGH said, that he considered it as a public duty to have the proceedings produced.

Upon which suggestion from his Lordship, the proceedings were produced; and upon being referred to, the act of bankruptcy appeared to have been committed in the month of *November*, 1799, which preceded the date of the note.

The defendant's counsel contended, that this was not admissible as evidence of the act of bankruptcy: that it was necessary for the plaintiff to prove the act of bankruptcy by distinct evidence, such as would be required in the case of an action by the assignee.

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The plaintiff's counsel, on the other hand, insisted, that the defendant, having relied on the certificate obtained under the commission, and that the defendant was a bankrupt at the time, and of course that a good act of bankruptcy had taken place, it must be taken that this was the act of bankruptcy relied on; and that of course the deposition was evidence.

Lord ELLENBOROUGH ruled, that this was evidence of an act of bankruptcy at that time; and that it should be sufficient evidence of an act of bankruptcy at the time specified in the proceedings.

Verdict for the plaintiff, with liberty to move to set the verdict aside.

Gibbs and *Giles* for the plaintiff.

Garrow and *Espinasse* for the defendant.

This case was afterwards compromised.

DOVER

1803.

DOVER *against* MAESTAER.

THIS was an action of debt, on the statute 2 *Geo.* II. *c.* 24. against bribery at elections.

A note given by a voter who has been bribed, for repayment of the sum given to him, in order to secure his vote, in an action of debt for the bribery, may be given in evidence, though not stamped, to prove the fact of bribery.

The declaration stated, that the defendant, being a candidate to represent the borough of *Heydon*, in *Yorkshire*, at the last general election, corruptly gave to one *James Sharp*, a voter, money (to wit, 5*l.*) as a reward to vote for him, to be returned on the said election.

Sharp was called as a witness.

Lord ELLENBOROUGH cautioned him: that 2 *Geo.* II. *c.* 24. though the time (two years) *given by the statute for bringing a civil action against him for receiving a bribe was gone by, yet there was no limitation at common law to a criminal prosecution by indictment; therefore he was not bound to answer any question which might criminate him.

[*93]

The witness said, he was sworn to speak the truth, and would: That during the canvass for the election, the defendant gave a supper to the out-voters in *London*; and made a speech, professing himself a candidate: that it had been an old custom in the borough, that every freeman who voted at the election, should receive after the rate of 20*l.* if he voted a *plumper* for the candidate; and 10*l.* for a *split vote*, without any express engagement or previous promise from the candidate to pay any thing.

The witness then proved that Sir *Lionel Dayrell* was elected a member for *Heydon* at the preceding election in 1796; but after the election, had not remembered the custom as to the defendant; for he had received nothing, though he had voted for Sir *Lionel*.

This he mentioned to the defendant *Maestaer*, at the supper; who desired to see him again. He called at the defendant's house afterwards; and announced himself as *James Sharp*, an out-voter for *Heydon*. Upon which he was introduced to the defendant; and he then asked him to accommodate him with 5*l.* The defendant gave him a 5*l.* bank-note; for which *Sharp* signed a promissory note, payable to the defendant on demand. The defendant then expressed his hope, that *Sharp* would not deceive him, as he should not like to be laughed at. *Sharp* said, the defendant might depend upon him; and they parted.

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At the election, the 5th of *July* following, *Sharp* gave his vote for the defendant; and had all his extras paid, including his

1803.

DOVER *against* MAESTAER.

his journey from *London*. After the election, *Sharp* called upon the defendant, who desired him to make out his account of what he had received from him and his agent, which was about 3*l.*; and then gave him 2*l.* 10*s.* which, including the 5*l.* note, made the sum of 10*l.* 10*s.* amount to 10*s.* more than the customary allowance to voters at *Heydon*.

The next witness called was *Christopher Savile*, Esq. one of the successful candidates.

Where a witness, who has been convicted of perjury at common law, is offered as a witness, is restored to a competency by the King's Patent of Pardon, it must be produced.

Before he was sworn in chief, *Dallas* swore him upon the *voir dire*. He asked him, if he was the *Christopher Atkinson* who had stood in the pillory, on a conviction for perjury? He admitted he was. *Dallas* then put in an examined copy of the record of the judgment; and objected to his competency as a witness, having suffered an infamous judgment.

Erskine admitted the objection; and put in the King's patent of pardon, which he contended restored his competency, and so Lord ELLENBOROUGH ruled; for being an indictment for perjury at common law, and not under the statute, it was competent to the King to pardon: but had it been a conviction under the statute, the royal prerogative is taken away by the express words of the statute.

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Mr. *Savile* was therefore examined; and swore, that in a private conversation, a short time before the election, between *Maestaer* and him, at his house, when they were friendly, and had joined interests, *Maestaer* told him that he had let *Sharp* have 5*l.* and had taken his promissory note.

The promissory note was then produced by the defendant, on proof of notice to produce it; and it appeared to be for payment of 5*l.* to *Maestaer*, on demand, signed by *Sharp*; but it was not stamped or witnessed.

Gibbs objected: that it could not be read in evidence for want of a stamp; but Lord ELLENBOROUGH ruled, that as the plaintiff did not give it as a security, or attempt to enforce it as a valid instrument, but as corroborative of the testimony of *Sharp*, that such a note was given by him for the money advanced him, it was evidence of the transaction.

On proof of these facts, and that the money was advanced in *London*,

Lord ELLENBOROUGH left it to the jury, Whether this was in fact and substantially a loan of money to *Sharp*, to be repaid by him, or only colourably so, and in truth to be retained by him, and to influence his vote at the election? If the latter, it was a corrupt

corrupt advance as a reward to vote, whatever shape it assumed; and however penal the consequence might be to the parties, the jury must find a verdict for the plaintiff, and give him his 500*l.* penalty.

1803.

DOVER *against* MAESTAER.

[96]

The jury found a verdict for the plaintiff on the first count.

Erskine and —— for the plaintiff.

Gibbs and *Dallas* for the defendant.

Erskine contended strenuously, that he had a right to reply, though *Dallas*, for the defendant, called no witnesses: he contended for it on the ground that the defendant's counsel had put in the record of conviction of *Atkinson*, for perjury, which introduced new matter of fact into the cause, requiring an answer and observations of counsel: but Lord ELLENBOROUGH ruled, that the discussion of the competency of the witness introduced by the production of the record, was merely collateral to the issue between the parties, which terminated on his lordship's having over-ruled the objection; and that *Erskine* was not entitled to a reply.

SHERIFF *against* POTTS.

[*97]

Dec. 22d.

THIS was an action of *assumpsit*, on a policy of insurance on the ship *Columbia*, "at and from *Guernsey* to *Gibraltar*, with liberty to touch and discharge goods at *Lisbon*."

Under the terms of a policy of insurance, with liberty to touch and discharge goods at *Lisbon*, though there is a clause for a return of premium, if she sails from the place where she touches with convoy, she is not warranted in taking in any cargo there, whilst waiting for convoy.

Loss by capture.

The policy had been adjusted at a loss of 100*l. per cent.*

Park, for the defendant, stated the adjustment; and that he should prove the settling by the *defendant, which would be sufficient proof for him to call upon the defendant to impeach it.

Lord ELLENBOROUGH said, it certainly would be sufficient so to launch the case; but that if the defendant could shew that the adjustment had been made under a mistake, or in any way get rid of it, there was an end to the plaintiff's case.

In which the plaintiff's counsel acquiesced, and relied on the adjustment.

Erskine, for the defendant, admitted the adjustment; but stated, that his defence turned upon a fact admitted by the plaintiff himself, in his answer in equity, namely, that after the ship had arrived at *Lisbon*, the defendant not only discharged part of her cargo brought from *Guernsey*, but had taken in another cargo for *Gibraltar*. This he contended avoided the policy.

Park,

1803.

SHERIFF *against* POTTS.

Park, for the plaintiff, in answer contended, that it appeared by the same answer that she had waited at *Lisbon* for a convoy to *Gibraltar*: that during that time, she had taken in part of her lading, which was when she could not have sailed, so that there was no delay for the purpose of getting in a cargo: that there was a clause in the policy, by which there was a return of premium in case the ship sailed with convoy from *Lisbon*, which recognized a right in the ship to stay there: but upon the construction of the words of the policy itself, he contended, that the words of the policy would admit such a construction as would warrant the taking in of a cargo at *Lisbon*; and in fact it was so generally understood.

[98] On the other side was cited the case of *Stilt* v. *Wardell*, 2 N. P. Cases, 640; in which Lord KENYON had ruled, that where, on a policy on a ship at and from *Whitehaven* to *St. Michael's*, and from thence to sail to, touch and stay at any port on the passage; that where she did touch, she was not protected under the policy in breaking bulk; and on that ground the policy was held to be void.

Lord ELLENBOROUGH. This is certainly a deviation, and discharges the policy. The liberty to discharge or take in a part of her cargo, must be governed by the terms of the contract between the parties. It is here to discharge her cargo: and nothing is said about taking in another. The construction contended for would go this length: that if a ship was detained by a foul wind, she might take in another cargo, and institute a new adventure. Her taking in another cargo at *Lisbon* is a new voyage, a new adventure: it is not within the terms of the policy.

The plaintiff was nonsuited.

Park and *Gaselee* for the plaintiff.

Erskine for the defendant.

CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN

HILARY TERM, 43 GEO. III.

SITTING-DAY AFTER TERM IN THE COMMON PLEAS.

BRIGGS *against* CRICK.

ASSUMPSIT on the warranty of a horse. The defendant had warranted the horse to be sound at the time of the sale.

A party who had been a former proprietor of a horse, and sold him with a warranty of soundness, may be a witness to prove that he was then sound, without a release.

The plaintiff proved the sale and warranty; and that he was unsound.

The defendant's case was to be made out by the evidence of several former proprietors of the horse; all of whom had sold him with a warranty.

The first witness being called, he was asked, if he had not sold the horse to the defendant, with a warranty that he was sound? He answered in the affirmative.

Best, Serjt. objected to his testimony, on the ground, that having given a warranty of the soundness, he was supporting his own case, and protecting himself from an action; inasmuch, as if the defendant succeeded in this action he would screen himself from the effect of being called upon on the warranty given by himself on the sale to the plaintiff.

[100]

It was answered, that this was not sufficient, as it was not a direct interest: besides which, though the horse might have been sound when sold by the witness, it did not directly prove that he was sound when sold to the plaintiff: it was matter of presumption only.

Lord

1803.

BRIGGS *against* CRICK.

Lord ALVANLEY. The verdict given in this cause cannot be given in evidence in any action to be brought against the witness, or against any of the former proprietors of the horse; if it could, it would disqualify them from being witnesses. This I apprehend to be the settled distinction since the case of *Bent* v. *Baker* (3 Term Rep. 27.) They direct interests in the event of the cause sufficient to disqualify them, though it might be matter of observation as to their credit.

Best, Serjt. and *Espinasse* for the plaintiff.

Shepherd, Serjt. and *Marryat* for the defendant.

SITTING-DAY AFTER TERM AT GUILDHALL.

[*101]
Feb. 15th.

UFFOLD *against* LEIT.

If a party makes a copy of a receipt, and adds to it other words: as for example, "in full of all demands," which words were not in the original, it is a forgery, if the copy is offered in evidence, on the supposed loss of the original.

ASSUMPSIT to recover the sum of 80*l*.

Plea of *Non-assumpsit*.

The money had been paid into the hands of the *defendant, who was a land-valuer and auctioneer, on the agreement for the purchase of some lands. The purchase had not been completed; and the action was brought to recover it back again.

The defence set up was, that the plaintiff and defendant had settled all their accounts; and that the plaintiff had given a receipt in full of all demands.

It was relied upon for the defendant, that the receipt was procured by gross fraud and imposition; and that the receipt which had been on another account, had had the words "in full of all demands," interpolated after it had been given.

A copy of the receipt was offered in evidence, on the suggestion of the original being lost.

Amongst other suspicious circumstances, it appeared that the defendant had made the copy of the receipt, supposed to have been given by the plaintiff, in his own hand-writing; and had deposited it with an innkeeper at *Dorking*, desiring him to take care of it, in case of any dispute. The copy contained the words "in full of all demands." This copy was produced, and was relied upon as evidence.

Lord ELLENBOROUGH. If the party, by making this copy, and relying upon it as evidence, has destroyed the original, and thinks he thereby avoids a prosecution for forgery, he very much deceives

deceives himself. I very well remember Mr. Justice BULLER trying a man indicted for forgery, under circumstances such as these; and that learned judge had no doubt, that he might have been * convicted on it. He however escaped on another ground.

1804.

UFFOLD *against* LEIT.

[*102]

Verdict for the plaintiff.

Garrow and *Lawes* for the plaintiff.

Marryat for the defendant.

SITTING-DAY AFTER TERM AT GUILDHALL, IN THE COMMON PLEAS.

HARMER *against* KILLING.

ASSUMPSIT for goods sold and delivered.

The defendant pleaded *non-assumpsit* and infancy.

Replication of a promise after full age. Upon which issue was joined.

The promise sufficient to bind an infant, after his attaining of full age, must be given voluntarily, and with knowledge that he was discharged by his nonage.

The facts of the case were, that the goods had been furnished, which the defendant had had. After he came of age, the plaintiff sent to him to demand the money. The person sent saw the defendant, and threatened to arrest him. Upon which the defendant agreed to give his note for it; but happening to mention what he was about to do to a friend of his, his friend said, Don't do it: draw upon your father's executors. He then refused to do any thing.

It was contended, by *Shepherd*, Serjt. That this was not such a promise as was sufficient in law to bind the defendant.

Lord ALVANLEY said, that the infant was discharged by his nonage for goods, not necessaries, if furnished to him before his full age; but that he might bind himself by a new promise, after he obtained his full age: but that he held that such promise must be voluntary, and given with knowledge that he then stood discharged by law: that where an infant under the terror of an arrest, had a promise extorted from him, or where it was given ignorant of the protection which the law afforded him, he should hold that he was not bound to it. If therefore the jury should be of opinion that the facts were, that this promise was so obtained, he should direct them to find for the defendant.

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Verdict for the defendant.

Best, Serjt. and *Lawes* for the plaintiff.

Shepherd, Serjt. for the defendant.

SITTINGS

SITTINGS AFTER TERM AT WESTMINSTER, IN THE KING'S BENCH.

HARDACRE *against* STEWART.

Saturday, Feb. 19th.

If a person employed as an agent for another in the sale of any property, has notice that what he is about to sell is not his principal's, and he yet continues to sell, he is personally liable in an action for the produce of the sale.

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THIS was an action for money had and received.

Plea of *Non-assumpsit.*

The defendant was an auctioneer; and had been employed by the assignees of *Wigstead*, a bankrupt, to sell the bankrupt's interest in a house, which he had occupied before he became a bankrupt.

There were several fixtures in the house, which * belonged to the landlord, and which were inventoried in the original lease, from the lessor to *Wigstead*, as lessee.

When the defendant advertised the house and fixtures to be sold, on account of the assignees of *Wigstead*, Mr. *Sterling*, who was solicitor to the landlord, waited on the defendant; shewed him the counterpart of the lease and the inventory of the fixtures; and desired that he would not dispose of such fixtures as were there inventoried, as they belonged to the landlord. He promised not to do so; and accordingly he sold the house without the fixtures.

Hardacre, the plaintiff, became the purchaser; but the defendant afterwards sold the fixtures to a builder, employed by the plaintiff to repair the house on account of the plaintiff; and he paid the defendant 62*l.* for them; which sum the present action was brought to recover, the plaintiff having been called upon by the original landlord.

It was contended for the defendant, That this action could not be maintained against the defendant, who appeared to be only an agent employed by the assignees to sell; and that therefore the action should have been brought against the assignees, who were principals; and *Sadler* v. *Evans*, 4 *Burr.* 1974. was cited, as particularly applying to this case: in which it was decided, That the title to property could not be tried in an action against the agent; which was the point here, as the whole turned on the title of the landlord or the assignees to these fixtures; and the defendant had sold not upon his own account, but as the agent for another.

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HARDACRE *against* STEWART.

Lord ELLENBOROUGH said, That he was of opinion, that the action was maintainable against the defendant, though what he had done had been done while acting as an auctioneer: That the law was so in the cases stated; but here the auctioneer had made himself, by the manner of conducting himself, *quasi* a principal. He had had notice not to sell: That the fixtures were the property of the landlord, and of course that they did not belong to his principals; notwithstanding which, he sold them, and received the value. If a man sells property of others, with full notice that he is doing wrong, and that he is disposing of that to which he has no title, he is liable to an action for money had and received.

Verdict for the plaintiff.

Gibbs and *Marryat* for the plaintiff.

Garrow and *Holroyd* for the defendant.

DOE ex dem. MASLIN, et alt. Assignees of WILLIAM SMITH, a Bankrupt, *against* ROE.

Same day.

THIS was an action of ejectment, to recover the possession of certain premises in *Stepney*.

Plea of Not Guilty.

By lease made in 1799, the premises in question were demised to *Smith* the bankrupt, for fourteen years.

In *March*, 1802, *Smith* had become a bankrupt, upon the petition of one *Gardner*. He had previously* deposited this lease with *Gardner*, he being then considerably in *Gardner*'s debt.

The plaintiffs proved the bankruptcy and the lease, which it appeared was then a subsisting one; and there rested their case.

Parnther, for the defendant, contended, That the plaintiffs could not recover, on the ground that nothing passed under the assignment but that in which the bankrupt was beneficially interested: That the only interest he had here, was a reversionary interest in this property; the right of possession to which he had no claim, having given it up by the deposit of the lease with *Gardner*; and cited 3 *Bos.* and *Pull.* 4.

The defendant called *Gardner*. He proved, that *Smith* the bankrupt, having been indebted to him, and he wanting security, *Smith* had deposited the lease of the premises with him,

If a trader, before his bankruptcy, deposit a lease as a security for money, but no mortgage or assignment of it then takes place, the assignees may recover it: it confers no legal title on the party it is delivered to.

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Doe ex dem. MASLIN, et alt. *against* ROE.

as a security; but no assignment was then, or at any time made by the bankrupt to him.

Upon that evidence, Lord ELLENBOROUGH said, This was no defence to the action. This was in the nature of a mortgage; but there was no assignment, nor was the legal estate ever passed out of *Smith*'s possession. Whatever remedy equity might give, the plaintiffs were entitled to recover at law.

Verdict for the plaintiffs.

Garrow and *Espinasse* for the plaintiffs.

Parnther for the defendant.

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REX *against* LOCKER, WAINWRIGHT, and Wife.

In an indictment for a conspiracy, the wife of one of the defendants cannot be called as a witness for the other.

THIS was an indictment against the defendants, for a conspiracy, in procuring a young lady, then a ward of the Court of Chancery, to marry the defendant *Locker*.

The defendants appeared by different attornies; and defended separately.

The defendant *Locker*, having gone through his case, Mr. *Erskine*, who was counsel for *Wainwright* and his wife, proposed to call Mrs. *Locker*. He stated the ground of his right to do so, on this, that though a wife could not be a witness for a husband, and so could not be called for *Locker*; yet, that where others were implicated, he might make use of her testimony merely to shew that the defendant, *Wainwright* and his wife, had not that share in this transaction imputed to them.

Lord ELLENBOROUGH said, He was clearly of opinion, that she was not admissible. A joint crime was imputed, in which her husband was implicated; and who would be benefited by it? It was a clear rule of the Laws of *England*, that a wife could not be called as an evidence for or against her husband, except in the excepted case of Lord *Audley*; and whether her evidence was mediately or immediately to affect him, the legal objection equally applied.

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Evidence having been offered of the circumstances of Mr. *Locker*, whom the information averred to be "a man of mean and low circumstances," in summing up to the jury the Lord Chief Justice said, It is averred in the information, That the defendant *Locker*, was "a man of mean and low circumstances:" that is an averment which is material; but it must be taken relatively. What may be good circumstances in one man, cannot be

be deemed so in another. The averment does not mean that he was an absolute beggar. Evidence has been offered of his circumstances. The jury will say, Whether they are of opinion that he is such a man? If they do not, they will find him not guilty on the count in which this averment is found.

They found all the defendants guilty; and they were afterwards sentenced to eighteen months' imprisonment.

Attorney-General, *Garrow*, *Best*, and *Abbott* for the prosecution.

Burrough and *Espinasse* for the defendant *Locker*.

Erskine, *Common Serjt.*, and *Reader* for the defendant *Wainwright* and wife.

BARBAUD *against* HOOKHAM.

[109]

Same day.

If words are spoken to a committee of persons, to whom the management of a volunteer corps is intrusted, respecting a member, as matter of fair representation respecting his principles, they are not actionable.

THIS was an action on the case, for slanderous words, imputing to the plaintiff disaffection to government.

The case was, That the plaintiff, being a member of the *St. James*'s Volunteer Corps, the defendant, who was a serjeant of the corps, had represented to the committee, by whom the general business of the corps was conducted, that *Barbaud* the plaintiff, who was then a member, was an unfit and improper person to be permitted to continue a member of the corps.

The words charged in the declaration were, That the defendant had said, That the plaintiff had been the executioner of the King of *France*; and that he had clapped his hands, rejoicing at the event; and adding, that *France* would then be one of the first countries in the world.

It appeared in evidence, that the plaintiff was a *Frenchman*; and that the defendant had not made use of the words publicly, but had communicated them to the officers of the corps, who constituted the committee for its regulation.

Lord ELLENBOROUGH said, That it was not to be allowed that such an action could be sustained. It was a communication made upon a most important matter for their consideration, Whether foreigners, the natives of a country in open war with us, were to learn the use of arms in a country threatened to be invaded by that country? The action was most ill-advised and improper.

The plaintiff was nonsuited.

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Erskine and *Clifford* for the plaintiff.

Garrow and *Lawes* for the defendant.

SITTINGS AT WESTMINSTER-HALL.

Feb. 24th.

SPENCER q. t. *against* MANN and others.

In an action on the 5th of *Eliz. c.* 4. for following a trade not having served an apprenticeship, if the declaration charge a particular trade to have been followed, and it appears to have been only a subordinate trade in another and principal trade, though forming a necessary part of it, it is a fatal variance.

THIS was an action of debt *qui tam*, to recover the penalties given by the statute of the 5th of *Elizabeth*, *c.* 4. for following a trade, and not having duly served an apprenticeship.

The count of the declaration, on which the plaintiff sought to recover, was this, "That the defendants used and exercised the mystery and occupation of sawyers, being a trade or mystery, &c. and being such sawyers, not regarding the statute, &c. did set a certain person (to wit, one *William Cullender*) to work on certain work in such trade, mystery, or occupation; and did continue him so set on during all the time, &c. although the said *William Cullender* had not been brought up therein seven years as an apprentice, contrary to the form of the statute."

It appeared in evidence, that the business of the defendants was that of mast and block-makers: That in the carrying on of that trade, it was necessary that the timber should be sawed up; but that was for the purpose of fitting it for their general trade of mast and block-makers; but that they had employed persons

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as sawyers, to saw up the timber for making the masts and blocks; and *Cullender* had been so employed; and that he had never served an apprenticeship.

The defendants' counsel objected: That the plaintiff should be nonsuited, on the ground of his having, in the declaration, stated the defendants to have carried on the business of sawyers; which was a material averment in the declaration: and that he had failed to prove it.

The plaintiff's counsel contended, That it appeared in evidence, that the defendants, though carrying on the business of mast and block-makers, in fact, carried on that of sawyers, it being a part of that business to saw up the timber used in it: That the statute extended to cases where the trade was carried on not solely, but as part of another, with which it was so connected, that the latter could not be carried on without it.

It was further observed by Mr. *Gibbs*, That it was a material averment to state that the defendants were sawyers; the offence being the setting to work a person who had not served as an apprentice;

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SPENCER, q. t. *against* MANN and others.

apprentice; which was an offence subjecting the party to a penalty, whether he was of any trade or not. *Beach q. t.* v. *Turner*, 4 *Burr.* was cited.

Mr. Justice LAWRENCE said, He was of opinion that the plaintiff should be nonsuited. The plaintiff had described the defendants as using and exercising the mystery or occupation of sawyers: that was not their business; it was that of mast and block-makers. Masts or blocks cannot be made without first sawing up the timber; but because it was necessary to saw out the timber to manufacture it to the uses of their trade, that did not make them sawyers: it was not the business which they proposed to follow. With respect to its being an immaterial averment, though it might be so taken in the beginning of the count, it could not be rejected in the part of the count where the breach was assigned as describing the offence, "the setting *Cullender* to work in such trade, mystery, or occupation, so used by them as aforesaid;" which was the offence of carrying on the business of sawyers, that being the trade which, in the beginning of the count, they were described as carrying on.

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The plaintiff was nonsuited.

Erskine, *Gibbs*, and *Espinasse* for the plaintiff.

Garrow and *Comyn* for the defendant.

GOOM *against* JACKSON.

Same day.

ASSUMPSIT for goods sold and delivered.
Plea of *Non-assumpsit.*

The action was brought to recover the value of a quantity of glue.

The plaintiff was a glue manufacturer, living in *London*; the defendant resided at *Stockport*, in *Cheshire*. The defendant had dealt with the plaintiff: and the glue had been sent by sea to *Liverpool*, and from thence forwarded to *Stockport*.

In general cases it is the duty of the shipper of the goods to send advice of the shipping to the consignee; but this is capable of being controlled by the course of dealing between the parties.

In the beginning of *July*, 1803, the defendant * had sent a written order for glue. It was for one quantity to be sent immediately; the remainder in two months after.

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The first parcel was sent on the 21st of *July*; and received by the defendant, who paid for it. The second parcel was sent in *September*, being two months after. The ship in which the latter parcel was sent was burnt, and the glue lost.

The defence was, That no letter of advice had been sent to the

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GOOM *against* JACKSON.

the defendant of the time of shipping the glue; so that the defendant had been prevented from insuring it.

The plaintiff's counsel answered, That the order having been given in *July*, specifying the times of sending the goods; and that the first parcel having been received, it was a notice of the plaintiff's acceptance of the order; so that he had a right to expect the second parcel in course, at the expiration of the two months; but that, at all events, it did not seem to be the course of their dealing so to give advice of the sending of the goods.

Mr. Justice LAWRENCE asked, If the defendant had had any letter of advice of the shipping of the parcel of glue in the month of *July?* No letter was produced.

Mr. Justice then said, That he was of opinion, that in general cases, it was the duty of the shipper of the goods to give notice of the shipping of them by a letter of advice; as otherwise, the conveyance of the goods might be subjected to the inconvenience suggested, that of losing the opportunity to insure; but that was
[114] capable of being controlled by the course of dealing between the parties; in which case such letter of advice might be dispensed with. In this case, it was in evidence that the parcel sent in *July* had been paid for, and yet no letter of advice was produced; so that there was evidence from whence the jury might infer that the course of dealing was such.

Verdict for the plaintiff.

Garrow and *Espinasse* for the plaintiff.

Gibbs for the defendant.

SITTINGS AT GUILDHALL.

SHIPLEY *against* HAMMOND.

ASSUMPSIT for rent of tithes, and on an account stated.

The plaintiff *Shipley* was owner of the tithes; *Hammond* was the occupier. The tithes were due in 1795; and the only doubt was, Whether the plaintiff was entitled to interest or not from that time?

Lord ELLENBOROUGH. If there was an agreement for tithes, to be paid on a particular day, the sum to be paid would bear interest from that time; but where it is only a general agreement for

for so much a-year, without specifying any time for the payment, no interest is payable.

Garrow and *Barrow* for the plaintiff.

Gibbs for the defendant.

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SHIPLEY *against* HAMMOND.

BOURDENAVE *against* GREGORY.

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THIS was an action on the case, brought to recover damages for not accepting stock, sold by the plaintiff to the defendant.

The seller of stock is bound to shew either an actual tender and refusal, or that he was at the place ready to make the transfer on the day of the purchase.

This was one of many actions which arose from the forged letter, supposed to have been written by Lord *Hawkesbury* to the Lord Mayor, notifying a pretended signing of preliminaries of peace.

The transaction in question arose on the 5th of *May;* on which day the plaintiff, by his broker, sold 1000*l.* three *per cents.* at sixty-nine. In the course of the same day the forgery was detected; and by a Resolution of the Stock Exchange, those bargains were declared to be void; and that the persons who had purchased should not be bound. The plaintiff insisted on the performance of the contract; and the present action was brought.

The plaintiff proved an application to the defendant to accept the stock, on the 6th and 7th; and the stock was sold on the 12th at sixty-four, leaving a loss of five *per cent.;* to recover which the action was brought.

Garrow, for the defendant, objected to the plaintiff's right to recover, on two grounds: First, That the plaintiff was bound to have been ready to have transferred the stock on the day of the purchase; and that he should have presented himself on the latest hour of the day, or on the next transfer day, of which there had been no evidence given: That that was necessary, in order to shew that the plaintiff considered the contract as a subsisting [116] one, and on which he meant to rely: That it could not be allowed for him to play fast and loose with the contract, and to consider it as valid or not, as it suited his interest; as in case the stock had risen, the plaintiff might have retained the stock. Secondly, He contended, That the sale of the stock ought not to have been deferred till the 12th; but that under the act to which he referred, the stock should have been sold on the next transfer-day; and a delay until the 12th was an unreasonable one.

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BOURDENAVE *against* GREGORY.

Lord ELLENBOROUGH. With respect to the party waiting till the last moment, in a state of readiness to transfer, from the multiplicity of those transactions, it could not in point of convenience be possible; but I am of opinion, that it is sufficient for the plaintiff to shew a reasonable degree of promptness to transfer the stock in question; and it is a question for the jury, Whether there was an offer to perform his part with reasonable promptness? That I think is sufficient; and as it has been given in evidence that the broker did apply to the defendant on the 6th and 7th to accept the stock, the question is, Did he do so *bonâ fide*, and did Mr. *Bourdenave*, the plaintiff, tender himself with an unchanged purpose? I have looked into the act of parliament, and I do not think that the stock is required to be sold on the next transfer-day. I will, however, reserve this point; and the former, Whether the seller was not bound to have been at the * time and place on the last hour of the day to make a transfer.

In order to entitle a party to recover the difference arising on a resale of stock which the defendant had contracted to purchase, it is not necessary that the resale should take place on the next transfer-day.

Erskine and *Richardson* for the plaintiff.

Garrow and *Gibbs* for the defendant.

In the next term the two reserved points came before the Court, when Lord ELLENBOROUGH changed his opinion; and it was decided, That it was necessary to shew an actual tender and refusal; or that the plaintiff waited at the *Bank*, on the day it was understood the transfer was to be made, until the books closed. On the other point, the Court concurred in opinion with his Lordship. S. C. 5 *East*, 107.

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March 1st.

WALLACE, Administrator, *against* COOK.

The book kept at the Sick and Hurt Office, containing copies of the returns made by the officers of persons that have died on board of King's ships, is evidence of the death of seamen.

THIS was an action of *assumpsit*, for money had and received, brought by the plaintiff, as administrator of his son, who had been a sailor on board a King's ship, and who died on board the *Spanker* hospital-ship.

It was given in evidence, That he entered on board a King's ship in *September*, 1794; at which time he had given a power of attorney to receive his wages, &c. He served on board of other ships, the last of which was the *Union*; and died in *September*, 1799.

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To prove his death, a clerk was called from the Sick and Hurt Office: he produced a book from the office, in which the death of the plaintiff's son was entered.

He

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WALLACE, Administrator, *against* COOK.

He was asked as to the nature of the book produced, *Erskine*, for the defendant, having objected to it as evidence. He said, That it was a copy from the different returns, made by the officers of the ships of persons dying on board; and that what was entered there, was from such a return made by the surgeon of the *Spanker*. He was asked, For what purpose the book produced was kept? and if for any public purpose? He said, That returns were made from it to the Inspector of Wills.

Lord ELLENBOROUGH said, That it was clearly evidence. It was a book of office, kept by a public officer under the Admiralty; and to which credit was given, by the inspectors receiving it as evidence of the death of the sailors mentioned to be dead in the different returns.

The defence was, That the money was paid to the person having the power of attorney. This payment was made in 1800.

Lord ELLENBOROUGH. This is no defence; the sailor having died in *September*, 1799, his death was a revocation of the power of attorney; and no subsequent payment was legal.

Verdict for the plaintiff.

Gibbs and *Hullock* for the plaintiff.

Erskine for the defendant.

BRARD *against* ACKERMAN. [119]

In an action by the indorser of a bill, payable to the drawer's own order, the drawer may be a witness to prove usury in discounting the bill.

ASSUMPSIT on a bill of exchange, drawn by *Skill* on the defendant, in his own favour, accepted by the defendant, and indorsed by *Skill*, dated the 24th of *September*.

The plaintiff proved the hand-writings; and there rested his case.

The defence was, usury in the discount of the bill by *Skill*.

Skill was called to prove it. He was objected to by *Erskine*, on the ground that the object of his testimony being to destroy the bill, on which his name appeared: he had an interest, which no release could cure.

It was answered, That the verdict here could not affect any claim against *Skill*: That he was still liable to be sued on the bill; and though *Skill* might, by his evidence on this trial, defeat the action against *Ackerman* the defendant, the plaintiff might recover against him, as the witness might not be able to establish usury when the action was brought against himself.

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BRARD *against* ACKERMAN.

Lord ELLENBOROUGH said, He was admissible, on the ground of the verdict not being evidence in any trial against the witness, whose name was on it: That the usury did not destroy the bill, so that it could never be produced again. The plaintiff might sue on it, and recover against the witness.

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To prove the usury, it was suggested that the bill in question and another had been discounted together; for which a sum of 12*l.* had been given, which was here usurious. No notice had been given to produce the other bill; but the plaintiff called Mr. *Trickey*, the plaintiff's attorney. He was asked, If he had a bill in his possession, drawn by *Skill* in his own favour, on *Ackerman*, dated the 26th of *September*, 1803, for 71*l.*?

It was objected: That this question could not be asked, as this bill had come to the possession of the witness in the character of attorney.

It was answered, That this circumstance was a fact founded on the witness's knowledge of a certain piece of paper being in existence; and not a fact known by the communication of his client.

An attorney is not bound to speak as to the particulars of a bill of exchange, when the knowledge of those particulars is only derived from the bill being entrusted to him by his client.

Lord ELLENBOROUGH. The question is put, as to the existence of a bill of a particular description, as to names, times, and dates, which are contained in the question, that is not a mere fact; but consists of circumstances which the attorney came to be acquainted with from the delivery of the bill to him by his client: That is a communication from him by his client, which he is not bound to disclose. I think the question cannot be asked.

Erskine, *Gibbs*, and *Barrow* for the plaintiff.

Garrow and *Hovell* for the defendant.

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SITTINGS AT GUILDHALL.

March 1st.

MANLEY et UX. *against* PEEL.

A receipt for interest on the back of a note, without a stamp, and which cannot therefore be given in evidence, is evidence to go to the jury, from which they may presume, that from the payment of so much for interest, there was a principal sum in proportion due.

ASSUMPSIT for money due to the plaintiff's wife before marriage, upon three promissory notes and an accountable receipt. Amongst the rest, the plaintiff put in a promissory note for 170*l.* dated the 8th of *June*, 1801, without a stamp; so that it could not be received in evidence; but a memorandum was

indorsed, in the defendant's hand-writing, thus, "8*l.* 10*s.* paid for interest, 1802."

1804.

MANLEY et Ux. *against* PEEL.

Lord ELLENBOROUGH observed to the jury, That though they could not consider the note, containing this indorsement, as read in evidence, for want of a stamp, yet the receipt might be read, as evidence for them to consider, Whether, in the year 1802, a principal sum of money was not thereby admitted to be due from the defendant to the plaintiff, yielding an interest equivalent to 8*l.* 10*s.* which the indorsement purported, without any reference to the note itself?

Erskine and *Wood* for the plaintiff.

Garrow and *Barrow* for the defendant.

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Same day.

REED *against* WHITE and others.

If a person, who supplies stores to a ship, of which there are several owners, takes in payment the bill of the ship's husband (a part-owner) only, and settles with him alone, he discharges the other owners, particularly if the bill be renewed.

THIS was an action for cordage sold, against the defendants, as owners of the ship *Princess Mary*.

The defendant *White*, was the managing owner or ship's husband. The plaintiff took *White*'s bill for the amount, which was dishonoured; and renewed, and again dishonoured.

For the other defendants, it was insisted, That the plaintiff had discharged the other owners, who, in ignorance of this mode of dealing between the plaintiff and *White*, had suffered him to receive large sums of the East India Company for freight, which they would otherwise have detained.

Lord ELLENBOROUGH. If the plaintiff, dealing with *White* separately, has adopted him, he has discharged the others, and must have a verdict against him: it was not necessary there should have been a receipt. If he has adjusted accounts with him on that footing, the other defendants are entitled to the benefit of it. The first renewed bill is expressed to be for cordage found for the *Princess Mary*, and drawn only on *White*. If this was drawn on him, as for himself and as agent for his partners, it was a prolongation of time as to all. The question is, Whether it was intended as a settlement with him alone, and adopting him as the single debtor?

A very respectable full special jury of merchants found for the defendants.

Erskine and *Garrow* for the plaintiff.

Dallas and *Const* for the defendants.

CASES

1804.

ARGUED AND RULED

AT

NISI PRIUS.

HOME CIRCUIT.

LENT ASSIZES

AT HORSHAM, 1804.

CORAM HEATH, JUSTICE.

REX *against* LEE and Another.

March 20th.

The publication in a newspaper of the depositions taken before a justice of the peace on a criminal charge, before the party is tried, is libellous, and a misdemeanor; neither can the printer, on an information against him for a libel, give them in evidence to shew that they were truly published.

THIS was an information filed by the attorney-general against the defendants, who were the printers of a newspaper called the Sussex Journal, for a misdemeanor.

The offence charged in the information was, The publishing of three several accounts in that newspaper, of a transaction, in which a smuggler had been shot by an excise officer of the name of *Bignold*, who had been committed to Lewes Gaol to take his trial for murder, and who was in gaol under that charge when the several advertisements appeared: the information charged in the first count, "That the defendants, before the preferring the indictment against *Bignold* *for the supposed crime, and before the trial of the said offence; for the purpose of preventing the due course of law and justice, and to influence, inflame, and prejudice the minds of the people against the said *Bignold*, and to cause him to be continued in prison, and convicted of the said offence, published the infamous and malicious libel following, &c." the libel was then set out, and was a paragraph in the said newspaper. The paragraph consisted

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REX against LEE.

of a statement of the depositions taken before the justice of the peace before whom *Bignold* was charged with the offence, and which induced the justice to commit him to prison, and contained several expressions and representations prejudicial to the character of *Bignold*.

The counsel for the prosecution proved that the defendants were the proprietors and publishers of the newspaper in question; they proved the publication of it by them, and of the newspapers containing the paragraphs in question, which were then read; and there rested their case.

Best, Serjt. of counsel for the defendants, urged in their defence, That the publisher of a newspaper had a right to publish a fair account of all public transactions which occurred, and which were matters of public notoriety, provided they were given fairly and impartially: that the paragraphs in question were an account of a matter of public notoriety, and that which they had published was a true report, founded on the depositions, as they had been taken before a justice of
[125] the peace: that the paragraphs in question being therefore a true narrative of public matter they could not be deemed to be libellous.

He was then proceeding in the course of his defence; and in order to prove that part of the case, he called the clerk to the justices before whom the depositions had been taken,

When HEATH, Justice, interposed. He said that such evidence was inadmissible; that putting the criminality of such proceeding out of the question, the evidence offered was *ex parte*; it was the deposition made by the prosecutor only. But he was of opinion, that the mere publication of *ex parte* evidence before a trial was of itself highly criminal.

He rejected it, and both the defendants were found guilty.

Shepherd, Serjt. *Garrow*, and *Wm. Jackson*, for the plaintiff.

Best, Serjt. *Partington*, and *Courthope*, for the defendant.

LENT ASSIZES 1804.

AT KINGSTON,

CORAM HOTHAM BARON.

REX *against* SALTER and Others.

THIS was an indictment for a conspiracy against the defendants, who were journeymen hatters.

Where there is evidence of several persons having engaged in a conspiracy, what is said by any of them, at another time and place, respecting the object of the conspiracy, is evidence against the others.

The indictment charged, that the defendants endeavoured to extort from one *Walter Kearns*, a journeyman hatter, the sum of a guinea; and on his refusal, that they endeavoured to cause and procure *him to be discharged from the service of one *Walls*, a master hatmaker, by whom he was employed in his trade and business of a hatter: the said guinea being a fine for his having broken certain rules alleged to have been made for the regulation of journeymen hatmakers, and upon his refusal to pay it, in order to prevent the said *Kearns* from being employed, that they, in order to compel *Walls* to discharge him, unlawfully absented themselves, and refused to work for *Walls*. *[126]

Kearns was called, and proved that he, with several others, worked for a Mr. *Walls*, who was a hat-manufacturer; that on the 20th of *November*, 1802, the journeymen met at the manufactory in a garret; that the witness was sent for, and told that he must pay a fine of a guinea; that the defendants and several others were assembled.

The witness was then asked if he had heard any of the persons who were so met together in the garret, say any thing respecting the appointment of delegates?

Bayley, Serjt. objected, that their declarations were not evidence against the defendants on the record, whose criminality was only to be inferred from declarations made by themselves.

It was answered, that this was an indictment for a conspiracy, charging the defendants and several others with an illegal act;

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REX *against* SALTER.

and that the rule was, that wherever you lay a sufficient foundation by evidence to go to the jury, of several persons having met for the purpose of a conspiracy, the declarations of any of the parties made at any *time or place relating to the object of *[127] the conspiracy, was evidence as against all. That this was first ruled in a case of the *King* v. *Bower*; and had been so ruled by BULLER, J., and at the State Trials in the case of *Thomas Hardy*.

Bayley, Serjt. contended, that it was confined to cases where any acts were done by any of the conspirators, in pursuance of such conspiracy, in which case he admitted that such evidence certainly was admissible.

HOTHAM, B. said, he held himself bound by what had been ruled and decided before, to hold this evidence admissible; and the question was accordingly asked.

The defendants were convicted.

Garrow, *Best*, Serjt., and *Nolan*, for the prosecution.

Bayley, Serjt. and *Fielding* for the defendants.

CASES

1804.

ARGUED AND RULED

AT

NISI PRIUS

IN

EASTER TERM, 44 GEORGE III.

SITTING-DAY AFTER TERM AT WESTMINSTER.

SHUTT *against* LEWIS.

May 15th.

A temporary use of a room in a public-house for the purpose of dancing on a particular festival or occasion, does not subject the owner to the penalty of the statute 25 *Geo.* II.

THIS was an action of debt, brought to recover the penalty of 100*l.* given by statute 25th of *Geo.* II. *c.* 36. By the second section of which statute it is enacted, That from and after the first day of *December*, 1752, any house, room, garden, or other place kept for public dancing, music, or other public entertainment of the like kind, in the cities of *London* or *Westminster*, or within twenty miles thereof, without a licence had for that purpose, should be deemed a disorderly house, or place, &c. and every person keeping such house, should forfeit *the sum of 100*l.* for keeping such house for music and dancing without being duly licensed by the magistrates, pursuant to the direction of that statute.

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The

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SHUTT against LEWIS.

The plaintiff's witnesses proved: That *in a room in the back part of the defendant's house, which was a public one, in the month of April preceding, there was music and dancing,* and that they had gone in and danced there: That there were several others there assembled for that purpose; and one witness swore, that *Lewis*, the defendant, who was the landlord of the house, took sixpence from him for admission; but another witness proved that the sixpence so taken was paid for the fiddler, as a subscription among those who were assembled for the purpose of dancing, and not for admission.

The defendant did not deny that dancing had taken place in his house at the time stated; but his defence was, that the room had been taken by a person of the name of *Velasco*, who was a Jew; that he had taken the room for eight days, which was the Passover among the Jews; that it was for the entertainment of his friends, who were persons of the Jewish persuasion, and that the room was only made use of during that period.

It was also proved, that the room was not appropriated to the purpose of public entertainment in music or dancing; and that, in fact, at no other time had any such entertainment of dancing or music ever taken place.

Lord ELLENBOROUGH said, That under the act of parliament, a defendant incurred the penalty for keeping a house for public dancing, music, or other public entertainment.

[130] That the mere use of a room in the house for a temporary purpose of dancing or music did not come within the intent or meaning of the statute, as the house or room should have been *kept* for that purpose: That this appeared to be a mere temporary appropriation of the room to that mode of entertainment for eight days, during which it was hired, and which the persons were keeping as a festival; that it was proved that it was not used for any such purpose at other times: this, his Lordship added, could not be called a keeping of a house for public dancing and music; it was not appropriated to any such purpose, but at all other times used as part of the public-house, and was not within the meaning of the act, which was levelled against disorderly houses.

His Lordship directed a verdict for the defendant, which the jury found.

Garrow and *Marryat* for the plaintiff.

Erskine and *Espinasse* for the defendant.

1804.

HESKETH *against* GOWING.

May 17th.

ASSUMPSIT for the board and lodging, clothes, and other necessaries, found and provided for a female child of the defendant's.

The father of a bastard child, if he has adopted it as his own, though no order of bastardy has been made on him, is liable for the nursing and necessaries furnished for its use.

The plaintiff proved that she had nursed and brought up the child, which was a natural child, but that the defendant had admitted it to be his; he having frequently visited it at the plaintiff's; and that the charges were fair and proper.

The defence was, that the child was illegitimate, and though the child had been nursed by the plaintiff, it had afterwards been taken home by the defendant into his own house, where it was properly provided for; that, against the consent of the defendant, the mother of the child had taken it from the defendant's house, and had sent it back to the plaintiff, where it was admitted; and had been properly attended to and taken care of; and that no order of *filiation* or maintenance had ever been made.

It however came out on the cross-examination of the defendant's witnesses, that though the child had been so taken away from the plaintiff, yet that after the child had been taken away by the mother, the defendant knew that the infant had been sent back to the plaintiff, and placed under her care; and that he had taken no steps whatever to get her back, but suffered her to remain with, and be provided with every thing by the plaintiff.

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It was contended, on the part of the plaintiff, That the suffering the child to remain with the plaintiff was an acquiescence, on the part of the defendant, to the child's continuance with her, and that he was therefore bound to pay for it.

It was contended for the defendant, that the child being illegitimate, and *filia nullius*, and no order of bastardy having been made, the defendant could not be charged but on an express contract; that therefore he was liable to pay for the nursing, &c. before the child was first taken away; that after it had been so taken from the home of the defendant against his consent, that he could not be charged by a supposed contract, to which he had not agreed.

Lord

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HESKETH *against* GOWING.

Lord ELLENBOROUGH said, that there was nothing in the objection of the child being *filia nullius*, and no order of bastardy made; that the father was certainly liable to the payment of the demand for the nursing and board of his child, though illegitimate, if he adopted it as his own, and acquiesced in its being so disposed of in any particular way; but that having so taken the child with its mother's acquiescence, he had a right to keep it in his own care, and provide necessaries for it such as he thought fit; and if the mother took the child away without his consent, and put it to a person to nurse, that person could not charge the father: he could be charged only on his contract. It was, however, in evidence, that the child was put to nurse to the plaintiff, with whom the defendant knew she had been before, and where he had visited; it was also very
[133] plain, that when last taken away, the defendant knew where the child was, and that he took no steps to take it back; his acquiescence in the child's continuance there was an acquiescence in his former liability. But he left it to the jury, as to the defendant's acquiescence in her being so taken care of.

Verdict for the plaintiff.

Erskine and *Wigley* for the plaintiff.

Garrow for the defendant.

May 20th.

STILES *against* RAWLINS and Another.

If the declaration in an action for a false return on a *fi. fa.* in setting out the writ, states the indorsement to levy the sum, together with the sheriffs' poundage, officers' fees, and other legal charges and incidental expenses attending the same, and the writ when produced is to levy the sum, together with the sheriffs' poundage, officers' fees, &c. it is a variance.

THIS was an action against the defendants as sheriff of *Middlesex*, for a false return.

Plea of Not Guilty.

The declaration stated, That a writ of *fi. fa.* had issued, which was indorsed to levy 600*l.* together with the sheriffs' poundage, officers' fees, *and other legal charges and incidental expenses attending the levy.*

The office copy of the writ was produced, and given in evidence: but it was indorsed "to levy 600*l.* together with the sheriffs' poundage, officers' fees, *et cetera.*"

It was objected that this was a variance, the words in the declaration, "other legal charges and expenses attending the levy,"

levy," not being found in the indorsement on the writ, in which were the words *et cetera* only.

*It was answered, that the words *et cetera* comprehended what were the legal and incidental charges, and that the plaintiff might therefore set out at length, what was the legal import of the words in the shape in which they stood in the indorsement. *[134]

Lord ELLENBOROUGH said, That he was of opinion, that the production of the writ did not support the declaration, and *nonsuited* the plaintiff on the ground of the variance, with leave to move to set it aside.

Erskine and *Wood* for the plaintiff.

Garrow and *Gibbs* for the defendant.

PETO *against* HAGUE.

DEBT on statute to recover the penalty for selling coals, short of measure, the coals having been sold as Pool measure.

What is said by an agent respecting a contract or other matter in the course of his employment, which contract or matter is the foundation of the action, is good evidence to affect the principal; *aliter*, what is said by him on another occasion.

The plaintiff called the coal-meter to prove the transaction, and the fraud practised in the sale of the coals. The defendant was a coal-merchant: but his business was conducted by one *Peely*, who was his nephew. The witness, in giving his evidence, was proceeding to state a conversation between him and *Peely*; which was, that while the coals were at the wharf, he asked *Peely*, whether the *coals then lying in the Punt were to be sold by wharf or Pool measure?

Garrow of counsel for the defendant, objected, that what was said by *Peely* was not admissible evidence to affect the defendant. That *Peely* should himself be called; for, taking him to be even the agent of the defendant, his declaration could not be evidence, although his *acts* might be so. *[135]

Lord ELLENBOROUGH ruled that it was evidence; he said, that *Peely* appeared to be the manager and conductor of the defendant's business: what he might have said respecting a former sale made by the defendant, or on another occasion, would not be evidence to affect his master; but what he said respecting a sale of coals, then about to take place, and respecting the disposition of the coals then lying at the wharf, which were the object of sale, was in the course of witness's employment

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PETO *against* HAGUE.

employment for the defendant, and was evidence to affect his master. He accordingly admitted it.

Verdict for the plaintiff for one penalty.

Erskine and *Marryat* for the plaintiff.

Garrow for the defendant.

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May 25th.

PLUNKETT *against* COBBETT.

In case for a libel published in a weekly paper, after proof, the buying of the paper at the defendant's shop; in which the libel was contained; evidence of similar papers purchased at the defendant's shop at other times is admissible evidence, to shew that the paper was regularly published, and that the libellous publication was deliberately made.

THIS was an action on the case, for a libel reflecting on the public conduct and character of the plaintiff, who was Solicitor General of *Ireland*. The libel was contained in a publication by the defendant, in a paper, called *Cobbett's* Political Register, published weekly by the defendant.

Plea of Not Guilty.

To prove the publication of the libel, the plaintiff's counsel called a witness, who proved, that he had purchased the paper, called *Cobbett's* Political Register, and which contained the libel in question, at the office kept by the defendant for the sale of the paper, in *Pall Mall*, soon after the publication of it, that being the place where those papers were sold. Having proved the fact, he was further asked, Whether he had since that time purchased any other paper of the same title, at the same office? He answered, that he had purchased one of the same title and description, two days before, at the same office.

This evidence was objected to by the defendant's counsel. That this being a question of damages, the purchase of another paper, at another time, could not be received in evidence in this action.

Lord ELLENBOROUGH said, He would admit it to shew, that the papers which purported to be weekly publications of

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public transactions, were sold deliberately, and vended in the regular course of public circulation. That the paper containing the libel was not published by mistake, but vended publicly, deliberately, and in regular transmission for public perusal; but that he should direct the jury not to take it into consideration in damages.

The speaker, or a member of parliament, may be called upon

The libel having reflected on the plaintiff's public character and conduct in Parliament, in *Ireland*, before the Union; Mr. *Foster*, who had been Speaker of the House of Commons

at

at the time of the Union, was called as a witness. He was asked, Whether, during that period, and while he was Speaker of the Irish House of Commons, he had heard the plaintiff deliver his sentiments in parliament on matters of a public nature? Mr. *Foster* objected to answer any question of that description; the object of it being to disclose what had passed in parliament.

to give evidence of the fact of a member of parliament having taken part, or spoken on a particular debate; but he cannot be asked as to what he then delivered in the course of the debate.

Lord ELLENBOROUGH said, That Mr. *Foster* was warranted in refusing to disclose what had taken place in a debate in the House of Commons. He might disclose what passed there, and if he thought fit to do so, he should take it as evidence; but as to the fact of Mr. *Plunkett* having spoken in parliament, or taken any part in the debate, he was bound to answer; that was a fact, containing no improper disclosure of any matter then under discussion in parliament; but he was not bound to relate any thing there spoken by Mr. *Plunkett*, which had been delivered by him, as a member of parliament.

A speculative opinion in a book of the same tendency as the libel, may be read as part of the counsel's speech; but if the extract is the representation of a fact, it cannot be read, unless the counsel calls witnesses to prove it.

*In the course of his address to the Jury, *Adam*, of counsel for the defendant, observing, on part of the libellous matter, stated by the defendant of the plaintiff in the libellous publication; urged it in his defence, that if the matter imputed to the defendant as libellous, had been published before on other occasions, and in other works, that that would operate in mitigation of damages. He then produced a book, from which he began to read a paragraph of a similar tendency with the libel in question; when he was interrupted by *Garrow*, of counsel for the plaintiff, who objected to his reading it, unless he meant to give it in evidence.

Lord ELLENBOROUGH said, That if what Mr. *Adam* was about to read, was a speculative opinion in a book, bearing upon the question under discussion, he had a right to read it as part of his address to the jury: but if he read the extract as stating a thing having real existence; and to prove that such a fact had taken place, produced the publication, it could not be read for any purpose, unless it was afterwards given in evidence.

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Verdict for the plaintiff.

Erskine, *Garrow*, and *Nolan*, for the plaintiff.

Adam and *Richardson* for the defendant.

1804.

IN THE COMMON PLEAS.

AT GUILDHALL.

HAMMOND et al. Assignees of GADSDEN, a Bankrupt, *against* HINCKS.

Evidence of a trader having left his house to avoid his creditors is a sufficient act of bankruptcy, though no creditor called in his absence.

THIS was an action of trover, brought by the plaintiffs, as assignees of *Gadsden* a bankrupt, to recover the value of a quantity of bacon claimed to have been the property of the bankrupt, who dealt in that commodity before his bankruptcy.

The defendant was what is termed a drier of bacon. The bacon had been sold to the bankrupt *Gadsden* a short time before his bankruptcy, by the house of *Pinnel* and Co. and had been sent by them by the bankrupt's orders to the defendant, to be dried. *Pinnel* and Co. having indemnified the defendant, this action was brought to recover the value, they having stopped it *in transitu*, and countermanded the delivery.

To prove the act of bankruptcy, the plaintiff called the son of the bankrupt, who had lived with and conducted his father's business. He stated, that on the 15th day of *March* his father had left his house. He was asked, what were his father's reasons for his doing so? He said it was to avoid his creditors, and that his father had told him so before he left his house.

He was asked on his cross-examination, whether during the [140] time that his father was so absent from his house any creditors had called for money? He said he could not say whether there were any persons of that description had called or not.

Best, Serj. objected, that the act of bankruptcy was not proved. That in order to make his leaving his house an act of bankruptcy, it was necessary to prove, that some person had called who was a creditor and who was thereby delayed. He insisted that this was necessary, and that such evidence was uniformly required.

It was answered by the plaintiff's counsel, that the clauses in the statute as to the act of bankruptcy, were distinct, and that beginning

1804.

HAMMOND *against* HINCKS.

beginning to keep house and departing from his dwelling-house were different and distinct acts of bankruptcy. That under the former clause, the denial to a creditor who called for money was necessary, because the beginning to keep house, must be to delay his creditors, but that it was not necessary in the latter case, where a mere departing from his house was sufficient to satisfy the statute.

MANSFIELD, C. J. It has been proved that the bankrupt left his house to avoid his creditors; no evidence has been offered that any creditor has been actually delayed. It is objected that unless evidence is offered of an actual delay it is no act of bankruptcy, for that that circumstance is necessary to constitute an act of bankruptcy, and it is said that Lord KENYON decided in favour of the objection. I remember a case before me at *Chester* in which a similar objection was taken, and the authority of that case before Lord KENYON cited. It [141] struck me as a new doctrine. I thought, that if a man left his house in order to avoid his creditors, so that they might be thereby delayed, it was a sufficient act of bankruptcy, and I am of that opinion still. I think that case was afterwards moved, but the Court refused a new trial. I am of opinion that the plaintiffs have established a sufficient act of bankruptcy.

Plaintiff obtained a verdict.

Shepherd, *Bayley*, Serjts., and *Espinasse*, for the plaintiff.

Best and *Praed*, Serjts., for the defendant.

The case was afterwards moved and a rule granted, but it was afterwards discharged.

Vide Hammond v. *Anderson*. *Bosanquet and Pullen's New Reports*, 69.

Vide Cook's Bankrupt Laws, in which they are distinguished as distinct acts of bankruptcy.

1804.

CASES

ARGUED AND RULED

AT

NISI PRIUS

IN

TRINITY TERM, 44 GEO. III.

AT WESTMINSTER,

SITTING-DAY AFTER TERM.

WILDE *against* GRIFFIN.

June 21st.

A note given to the officers of a parish, to indemnify them against the expenses of a bastard child, is to be taken as an indemnity only as far as the parish have been put to expense, though not so expressed in the note. The maker may set up the defence that they were not damnified.

THIS was an action of assumpsit brought by the plaintiff as the payee of a promissory note for the sum of 13*l.* made by the defendant.

The plaintiff had been one of the overseers of the poor of the parish of *St. James's Clerkenwell*, and the action was brought by him in that character, to recover the amount of this note which had been given under the following circumstances.

In *February* 1804, the defendant had been charged as the putative father of a bastard child which was chargeable to that parish. He was afterwards apprehended, and had entered into a treaty with the parish officers, one of whom was the plaintiff, and they agreed to take 27*l.* to indemnify the parish. He paid 14*l.* down, and then gave the note in question for the remainder.

The

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WILDE *against* GRIFFIN.

The child lived about a month, and the parish paid the expenses of the mother lying-in, and the other expenses while the child lived, and for its funeral. The defence was, that the note having been given to indemnify the parish, could not be carried further than as an indemnity; and that if the parish were indemnified, it was all that they had a right to expect.

The defendant then gave in evidence, that the only expenses incurred, were those of the lying-in of the mother; the maintenance of the child while it lived, and the expenses of burying it. That these expenses did not amount to more than 10*l.* and the parish had already received 14*l.*, which more than covered them. So that there was no pretence for demanding the note as an indemnity to the parish.

The plaintiff relied on the note as being an absolute one, a voluntary engagement to the parish, to the full extent of the note, and that as in case the child had lived, they might have been subjected to the maintenance of it for a great length of time, so that the expenses of keeping the child would have exceeded the amount of the note, it was therefore a fair contract of which the parish had a right to avail themselves, and which ought to give the plaintiff a right to recover for their benefit.

Lord ELLENBOROUGH, after expressing his disapprobation of the practice of taking notes or such securities from persons charged as the putative fathers of bastard children, as tending to make parish officers negligent of the lives of such children: in his summing up, told the jury, they were to take into their [144] consideration, how far the parish were damnified; that the note was to be taken only as an indemnity to the parish, not as a note payable at all events. To hold it so, would be to give the parish officers an interest in the death of that child it was their public duty to preserve, which could not be tolerated; 14*l.* had been paid, and if they thought that the 14*l.* paid covered the whole of the expenses which the parish had been put to, there was no consideration for the note, and the jury should find for the defendant: but they were to take into their consideration, all the expenses incurred, and give the parish the full allowance for them.

Verdict for the defendant.

Garrow and *Espinasse* for the plaintiff.

Gibbs for the defendant.

Vide *Coke* v. *Gower*, 6 East Rep. 110.

1804.

AT GUILDHALL.

SITTING-DAY AFTER TERM.

BURT, Administrator, *against* PALMER.

Where an agent has been employed to pay money for work done, and the workmen are referred to him for payment, and he assents to it, an acknowledgment or promise to pay by him, will after six years, take the case out of the statute of limitations.

ASSUMPSIT for work and labour by the intestate in his lifetime.

First, Plea of *non-assumpsit.*

Secondly, *non-assumpsit infra sex annos:* Replication to the second plea, that defendant did undertake within six years.

The action was brought to recover the amount of a carpenter's bill, for work done at the house of the defendant Mrs. *Palmer*, in the year 1792.

To prove the plaintiff's case, he called a witness whose father had been a surveyor employed by the defendant to measure the work. He proved that a Mr. *Allen*, an attorney, had acted in the concerns of the defendant, in giving directions respecting the work and in paying the bills; and that at one time when the defendant was applied to for money, she said to the intestate, in *Allen's* presence, "you must apply to *Jack Allen*, and he will pay you;" to which *Allen* made no reply, but seemed to assent.

The work having been done in the year 1792, to take the case out of the statute of limitations, the plaintiff relied upon
[146] an admission of the debt, made by *Allen* about the year 1802, when applied to on the subject.

It was objected by *Erskine*, of counsel for the defendant, that this was not evidence to support a new promise within the six years; that for that purpose there should either be the admission of the party herself, or that *Allen* the agent upon whose promise the plaintiff relied, should be called: for though the acts of an agent, where his agency is once established, are admissible

missible evidence; that what an agent had said was not evidence, as he might himself be called. 1804.

It was on the other hand contended, that *Allen's* admission was evidence, that though the rule of evidence might be in general as stated by the defendant's counsel, here the promise was made respecting the payment of money which Mr. *Allen* had taken upon himself; for that he had in fact adopted the debt by the defendant's direction, and that she should therefore be bound by his admission. BURT *against* PALMER.

Lord ELLENBOROUGH said, that he was of opinion, that in this case it was evidence, the agency of *Allen* having been clearly made out and established. That it had been solemnly decided by the twelve Judges, at Hastings's trial, that where a person is referred to, to settle and adjust any account or business, what he says, if it is connected with the business which is referred to him, is evidence. That that was the case here, and that *Allen's* admission of the debt was binding on the defendant.

The plaintiff had a verdict. [147]

Garrow and *Espinasse* for the plaintiff.

Erskine and *Marryat* for the defendant.

AT WESTMINSTER HALL.

SITTINGS AFTER TERM.

CLARK *against* WISDOM. *June* 23.

THIS was an action on the case for slanderous words.

The declaration stated, that the plaintiff carried on the trade and business of a *Builder*, by which trade he gained divers great gains and profits, &c. and then laid the slander to be, that the defendant said of the plaintiff, "He is finished, he is a bankrupt."

A builder who buys timber, which he works into the houses which he builds, and sells when built, is not an object of the bankrupt laws.

Plea, Not Guilty.

Lord ELLENBOROUGH, upon the case being opened by the plaintiff's counsel, referred to the record, and expressed some doubt as to the action being maintainable. He said, that the description of the plaintiff's business laid in the declaration,

1804.

CLARK *against* WISDOM.

that of a "Builder," did not seem to be such as corresponded with the description of a trade, which it was necessary for the plaintiff to follow, to entitle him to support an action for words respecting it, as the term was equivocal, and of itself did not
[148] convey the idea of buying or selling. He, however, permitted the plaintiff to go into evidence of the nature of his business, as a builder, and to shew that it came under the description of a trade.

The plaintiff's counsel stated him to be a carpenter, purchasing timber from the timber merchant, and working it up for sale.

It was contended for the defendant, that the act of buying timber which was not manufactured, and but merely worked into the houses which the person had built, was not a description of trading within the bankrupt laws. That a selling of an interest in real property would not make a man a bankrupt, which this was, the houses being the object of sale. That the action was only maintainable by a trader of the description of those who sold the articles bought, either in the raw or a manufactured state.

The witness called for the plaintiff said, that the plaintiff was a carpenter, that he bought timber, but which he worked up into the houses which he built, and then disposed of the houses when he could. That he did not sell any of the timber in a manufactured state to any person, or otherwise than as worked up in the houses.

Upon this evidence Lord ELLENBOROUGH said the plaintiff must be called. To make the words actionable, they must be spoken of a person who was an object of the bankrupt laws. The evidence in this case was not a buying and selling of such articles as made the plaintiff a trader, or brought him within
[149] the scope of the bankrupt laws: it was selling an interest connected with the land, not a sale of mere personal chattels. He bought the timber only as an accessary, or necessary to the sale of the houses which he erected.

The plaintiff was nonsuited.

Erskine and *Espinasse* for the plaintiff.

Garrow for the defendant.

1804.

RIGHT ex dem. FISHER, HYRONS, and NASH, *against* CUTHELL.

THIS was an ejectment brought to recover the possession of certain premises, in the parish of *St. Paul's, Shadwell.* The ejectment was brought by the lessors of the plaintiff, as the trustees under the will of one *George Adams*, deceased.

Adams, in his lifetime, on the 20th of *October*, 1789, had demised the premises in question to the defendant's husband, (who was since dead, and to whom she administered), for 21 years from *Michaelmas*, 1789, with a proviso, that the lease might be determined by the lessor or lessee, at the end of the first seven or fourteen years, giving six months' previous notice in writing.

Adams died, and left his estate in trust to the three trustees, the lessors of the plaintiff.

In *March*, 1803, a notice in writing was given, signed by *Fisher* and *Nash*, stating it to be on behalf of themselves and *Hyrons*, reciting the lease, and giving thereby the defendant notice to quit at *Mich.* 1803, upon which the ejectment was brought.

The notice stated the will of *Adams*, appointing the lessors of plaintiff his executors, and that probate had been duly granted to *Fisher*, *Hyrons*, and *Nash*, and that they were then executors of the said last will, and in which character the notice was given. The lessors of the plaintiff then, in order to account for the notice being given by two only, on behalf of themselves and the third, proved that at the time when the notice to quit was given, *Hyrons*, one of the trustees, was out of the kingdom.

The plaintiff's case being closed, *Gibbs* for the defendant objected, that the plaintiff should be nonsuited on two grounds: first, that by the will of the testator it appeared that he had been seised in fee, so that his executors as such had nothing to do with this estate; whereas the persons giving this notice had described themselves as executors, and given the notice in that character, which should be as trustees.

Lord ELLENBOROUGH said, he was disposed to think, that as the persons who gave the notice, and who were the lessors of the plaintiff, were also trustees, and had the estate in them, though they might have misdescribed their character in the notice, that it yet would be sufficient, but that he thought there was another objection in the case to the plaintiff's right to recover.

Where there are three joint trustees of an estate, notice to quit or discontinue the possession given by two, is bad, even though given in the names of the three, and the third trustee afterwards adopts it, and joins in the demise in ejectment.

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FISHER *against* CUTHELL.

Gibbs then said, there was a clear objection in the notice, which was by two of the three trustees only, which should have been by them all.

*[151] *The plaintiff's counsel contended, that as *Hyrons*, the third trustee, was a lessor of the plaintiff on the record, though he had not actually signed the notice to determine the tenancy, he had adopted the act done in his absence by the other trustees by becoming so, and made it good; but that, at all events, there was a count in the declaration on the demise of the other two trustees on which the plaintiff might recover

It was answered by the defendant's counsel, that the trustees were joint tenants, and the estate was in them all, as they all together represented the testator: that the lease could not be put an end by two, it must be by the joint act of all, in whom the estate was; and that they should all join in a demise in ejectment, and could not sever in their demises.

Lord ELLENBOROUGH said, the objection must prevail; as the three trustees were joint tenants, and had the whole estate in them, of course, as they had not joined in the notice to quit, the notice was insufficient; that it was not cured by the demise of the two, for they had not the whole estate in them, and the plaintiffs were therefore not entitled to recover.

Erskine and *Marryat* for the plaintiff.

Gibbs and *Espinasse* for the defendant.

This case was afterwards moved, but the Court confirmed the opinion of the Lord Chief Justice. Vide 5 *East*. 491. S. C.

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COATES *against* WILSON.

Regimentals furnished to an infant who was a member of a volunteer corps, are necessaries.

ASSUMPSIT for goods sold and delivered.

Plea of the general issue.

The plaintiff was a tailor, and the action was brought to recover the value of a suit of regimentals for a volunteer corps, furnished to the defendant, of which he was a member. The defence was infancy.

Lord ELLENBOROUGH said, that in those perilous times, when young men had enrolled themselves in different corps, for the defence of the country, he should hold that clothes so furnished were necessaries.

Verdict

Verdict for the plaintiff.
Garrow and *Wigley* for the plaintiff.
Erskine for the defendant.

DOE ex dem. BUROSS and Others, *against* LUCAS and Others. [153]

THIS was an action of ejectment, to recover the possession of certain premises in the parish of *St. George* in the *East*. The plaintiffs claimed as tenants in common, as the representatives of the deceased.

The lands had been demised to a Mr. *Anthony Lucas*. There were several defendants on the record; some of whom were the representatives of that *Anthony Lucas*. He had left his widow his executrix.

The plaintiff proved the payment of rent by *Lucas*, and the notice to quit was given by leaving it at the house, which had been the residence of *Anthony Lucas* in his life-time, but there was no evidence of its ever having come to the widow's hands.

The mere leaving of a notice to quit at the tenant's house, without further proof of its being delivered to a servant, and explained, or that it came to the tenant's hands, is not sufficient to support an ejectment.

This evidence was objected to: It was contended, that this was not a legal notice to quit. That service at the house where the tenant lived was in no case sufficient. There should be a delivery to the tenant, his wife, or to a servant; and, in the latter case, evidence at least that it came into the tenant's hands; analogous to the regular service of a declaration in ejectment.

It was answered, That mere service at the house was sufficient, and that it was so decided in a case of *Jones* ex dem. *Griffiths* v. *Marsh*, 4th Term Reports, 464, that such service of the notice was sufficient. [154]

Lord ELLENBOROUGH, having referred to the case cited, said, That that case was different from this; in that case, the notice was delivered at the tenant's dwelling-house, and explained to the servant. The objection was then taken, that the servant was not called, who might have accounted for the notice, and stated whether it had been delivered or not; and that not being called, it was strong presumptive evidence, that her master had received the notice, and should be left to the

1804.

Buross *against* Lucas.

Jury: but here there was no such evidence offered. The tenant might be turned out of possession by a trick.

The plaintiff was nonsuited.

Gibbs and *Lawes* for the plaintiff.

Garrow, *Clayton*, Serjt. *Espinasse*, and *Carr*, for the defendant.

July 5.

Rex *against* Lafone, Hopburn, Davis, Billiter, and Another.

On a joint indictment against several for a misdemeanor, a defendant, who had suffered judgment to go by default, cannot be called as a witness for the others.

THIS was an indictment against the defendants for obstructing one *Jonathan Rogers* and others, who were searchers of leather, appointed under an Act of Parliament for the city of *London*, in the execution of their duty. *Davis*, and the other defendants, suffered judgment by default. *Lafone* pleaded not guilty.

*[155]

*The prosecutor proved the obstruction by the defendants, (who had suffered judgment by default) and which had been done with considerable violence. It appeared that *Lafone* had principally instigated the other defendants to resist the officers: and it was further stated and said, that it was the incitement of *Lafone* which operated much to induce them to proceed to that degree of violence.

Erskine, of counsel for *Lafone* the defendant, who had pleaded, stated to Lord Ellenborough, that he proposed to call the defendants who had suffered judgment to go by default, to give evidence upon the part of the defendant *Lafone*.

Upon Lord Ellenborough expressing some doubt as to the legality of admitting him, *Erskine* contended that there could be no legal objection to a witness, sufficient to deprive a party of the benefit of his testimony, but crime, or positive interest in the evidence he was to give: that here was no interest in the defendants, against whom there was judgment by default; so much otherwise, that the evidence which he proposed to call on them to give, would have a contrary effect, and go against their own interest; for as it was said that *Lafone* had been the instigator and promoter of the violence, their evidence, by diminishing his fault, increased their own: that as the extent of the violence and opposition to the officer had been proved, the

offence

1804.

REX *against* LAFONE.

offence of each defendant on the record was a distinct offence, and their punishment no ways connected.

Lord ELLENBOROUGH. In the case of a joint indictment, against several for a joint offence, I have never known this evidence offered, and I think it cannot be admitted. To allow this evidence, would go to every criminal case, for if two were indicted, one, by suffering judgment by default, might protect the other. There is a community of guilt: they are all engaged in an unlawful proceeding: the offence is the offence of all, not the act of the individual only.

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The defendant *Lafone* was found guilty.

Gibbs, the Common Serjt., *Knowlys*, and *Dampier*, for the prosecution.

Erskine for the defendant.

LANGDON *against* HULLS.

July 5.

ASSUMPSIT on a bill of exchange, drawn by the defendant in his own favour, on one *Pugh*, for 50*l.* two months after date accepted by *Pugh*, and indorsed by the defendant to the plaintiff.

Where notice of the dishonour of a bill has been given by letter, a copy of the letter cannot be given in evidence, as proof of notice of the bill having been dishonoured, unless notice has been given to produce it.

The plaintiff having proved the acceptance, and the handwriting of the defendant to the indorsement; then proved, that the bill when due was presented for payment at *Pugh's* house, and that it was not then paid.

To prove the notice to the defendant, as the drawer, of the non-payment by the acceptor; the plaintiff proved by the notary's clerk, who* presented the bill, that he had left word at the defendant's house that the bill had not been paid; the plaintiff also proved that his attorney, by his directions, had written a letter to the defendant, informing him of the non-payment of the bill by *Pugh*. It becoming necessary to prove this notice so given by the plaintiff's attorney, by letter to the defendant, the attorney was called. No notice had been given to produce this letter, but he having stated, that he had written such a letter, was proceeding to state the notice of the non-payment, as mentioned in the letter, of which letter he had a copy; when

* [157]

it

1804.

LANGDON *against* HULLS.

it was objected that evidence of the contents of the letter could not be given, as no notice had been given to produce it.

It was answered, that the letter was itself a notice, and that it had been decided, that notice to produce a notice was not necessary, and the case of *Jory* v. *Orchard*, 2 *Bos.* and *Pull.* 39. was cited as in point.

It was contended by the defendant, that notice of the non-payment of the bill had not been given in due time; and that the letter had not been written until several days after the time for regular notice had expired; and it therefore became important to ascertain the exact time when it was written.

Lord ELLENBOROUGH said, that notice of the dishonour of a bill of exchange by letter was certainly good evidence, and had been so decided; but that there were other circumstances, besides the mere fact of notice, which were necessary to give effect to it, so as to entitle the plaintiff to recover. These were
[158] the date, and the time when it was sent, which were material, for notice of the dishonour was not sufficient, unless given in the time required in the case of bills of exchange. To ascertain the date, the post-mark might be material: he was therefore of opinion, that the plaintiff could not give evidence of the contents of the letter, not having given notice to produce it, and that upon that evidence the plaintiff could not recover.

The plaintiff then proved a subsequent admission by the defendant, that he had had notice, and had a verdict.

Garrow and *Espinasse* for the plaintiff.

Erskine for the defendant.

HOVILL, Assignee of a Bankrupt, *against* LETHWAITE.

June 6.

If a bankrupt, previous to his bankruptcy, has given a power of attorney to another, to receive sums of money due to him, in consideration of engagements entered into by such person on account of the bankrupt, money received under such power, after the bankruptcy, may be recovered by the assignees.

ASSUMPSIT for money had and received.

Plea of *non-assumpsit*.

The action was brought to recover a large sum of money, which the defendant had received under a power of attorney,

executed by the bankrupt, prior to his bankruptcy, but which money had been actually received since the bankruptcy. 1804.

HOVILL *against* LETHWAITE.

The defence was, that the defendant having before *the bankruptcy, and while the bankrupt appeared to be solvent, entered into several engagements by indorsing and accepting bills of exchange, on account of the bankrupt, and for his use and accommodation; the bankrupt, before his bankruptcy, and as it appeared in evidence, in fact, before the date of the act of bankruptcy proved at the trial, had executed the power of attorney in question, impowering the defendant to receive money due to him (the bankrupt), and to apply it, in order to secure himself, by holding such money as he should receive under this power of attorney, to answer to the extent of his engagements. *[159]

It was then proved, that under such authority, he had received money belonging to the bankrupt, after the act of bankruptcy committed.

This money, the assignees contended, they were clearly intitled to recover, as being money had and received since the bankruptcy.

Garrow, for the defendant, stated that his client meant to rely, that the transaction having taken place when the bankrupt was solvent, and done without any fraud, he had a right to appropriate particular sums to secure real advances made to him, and to give a claim or lien on those particular sums, by authorizing the person who had made these advances, by power of attorney, to recover them. He therefore contended, that thepower of attorney being given to the defendant, on account of money to be advanced on these bills of exchange, on which he had put his name, and thereby subjected himself to the payment of them: he thereby acquired a lien or right to hold the money he had so received, as having been appropriated by the bankrupt, while he had a power so to apply it. [160]

Lord ELLENBOROUGH ruled it to be no defence, and directed a verdict for the plaintiff.

Erskine and —— —— for the plaintiff.

Garrow for the defendant.

WHITE *against* JONES, Esq. Marshal of the King's Bench.

In an action against the marshal for an escape, in which plaintiff declares that the person suffered to escape was indebted to him for goods sold and delivered, and that he sued out the process on which the party was arrested on that account; the averment in the declaration is not supported by shewing that the goods were sold on a credit which had not lapsed when the action was commenced.

THIS was an action on the case against the defendant for an escape.

Plea of not guilty, and a justification, which is hereafter stated.

The declaration stated in the usual form, that one *Mendall* and *Oppenheim*, being indebted to the plaintiff, for goods sold and delivered; he had arrested *Mendall*, and that he being in the custody of the defendant, who was Marshal of the King's Bench prison: the defendant had suffered him to escape, by which the plaintiff was prevented, &c.

The plaintiff proved, that he was a warehouseman, and had sold the goods in question to *Mendall* and *Oppenheim*, to the amount of 280*l.* and that he had arrested *Mendall*, who was committed to the custody of the Marshal, who had suffered him to go at large; but it appeared that he had suffered *him to go at large in consequence of being served with a rule for the allowance of bail; but this rule was entitled in a cause of *White* v. *Mendall* only, and not of *White* v. *Mendall* and *Oppenheim*, which was the real cause in Court.

*[161]

The defendant having pleaded a justification, that he had discharged the defendant under and by virtue of a rule of court for the allowance of bail; the defendant replied the special matter, that the action was against *Mendall* and *Oppenheim*, and the justification of bail in a cause of *White* v. *Mendall* only, a demurrer was filed to that replication, which demurrer coming on for argument, the Court were of opinion, that the justification was bad in point of law, and the plaintiff had judgment on demurrer. This action, therefore, now came on to be tried on the general issue.

The plaintiff, in support of the averment in his declaration, that *Mendall* and *Oppenheim* were indebted to him for goods sold and delivered, proved the sale of the goods by a witness, but this witness on his cross-examination, stated, that after the goods were sold, the plaintiff agreed to take in payment a present bill at three months. The sale had taken place the 7th

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WHITE *against* JONES.

7th of *March*, and the arrest of *Mendall*, under which he had been committed to the custody of the Marshal, was the 29th of the same month.

Erskine, for the defendant, objected, that the declaration averred that the defendant was indebted to the plaintiff, for goods sold and delivered; that that must mean a debt then due, for which the plaintiff could then support an action; [162] whereas here, when the action was commenced by arrest of the defendants, *Mendall* and *Oppenheim*, no action could then be sustained, the goods having been sold at a credit of three months, the beginning of *March*, and the writ sued out on the 29th of the same month, so that in fact the credit had not expired when the arrest was made, and of course, if the action against *Mendall* and *Oppenheim* had been defended, the plaintiff *White* could not have recovered in it.

Lord ELLENBOROUGH said, If the whole of the evidence was, that the goods were sold on a three months' credit, and the arrest had taken place before that credit was expired, he should hold that the averment was not satisfied, and should have nonsuited the plaintiff: but this was not a mere credit at three months, but a credit by a present bill at three months; and that did not appear to have been the terms of the contract at the time of the sale. There was no evidence that that bill was was ever offered or given, and for any thing that appeared might have been a swindling transaction. If that transaction took place after the sale, it was a condition of their dealing, in which if *Mendall* or *Oppenheim* did not deliver the bill in pursuance of it, they were not entitled to credit, but the plaintiff might claim direct and immediate payment. He, therefore, held that the averment was satisfied, and the plaintiff entitled to recover.

Verdict for plaintiff.

Gibbs, *Park*, and *Marryat*, for the plaintiff.

Erskine, *Garrow*, and *Wood*, for the defendant.

1804.

SURREY SUMMER ASSIZES, 1804.

RHODES *against* GIBBS.

When a declaration is not specially entitled, but refers to the first day of Term, and the cause of action proved is subsequent to the first day of term, the production of the writ, shewing the true time of its being sued out is sufficient if it was subsequent to the cause of action.

THIS was an action of trespass for breaking and entering the plaintiff's close, called the Fore Court, and throwing about different baskets of vegetables.

Plea of Not Guilty.

The declaration was entitled generally of Trinity Term.

The trespasses were proved to have been committed on the 18th of *June;* the term began on the 8th of *June.*

When the plaintiff had closed his case, *Garrow*, for the defendant, objected, that the plaintiff should be nonsuited: that the evidence was of a trespass committed after the first day of Term, to which the declaration referred: that it appeared, therefore, that the cause of action accrued after the suing out of the writ. The record was referred to, and corresponded with the objection as to the date.

HEATH J., was of opinion, that the objection was good.

The writ was produced, and it appeared to have been sued out the 21st of *June*, so that, in fact, the writ was sued out after the cause of action.

This was held to cure the objection, and plaintiff had a verdict.

Best and *Lawes* for the plaintiff.

Garrow and *Marryat* for the defendant.

Vide *Swancott* v. *Westgarth*, 4 *East*. 75.

CASES

1804.

ARGUED AND RULED

AT

NISI PRIUS

IN

MICHAELMAS TERM, 45 GEORGE III.

SITTING DAY AFTER TERM.

PIKE *against* LEDWELL and ANN MONPRIVATT.

An agreement for the purchase of stock to be transferred at a future day, at a price below the then value, is not usurious.

THIS was an action of debt on bond. The defendant having first craved oyer of the bond, which stated, that one *Richard Monprivatt* the elder, by his will bequeathed (*inter alia*) 400*l.* in the 3 *per cent.* consols to his wife, *Ann Monprivatt* (one of the defendants) her heirs and assigns, provided that she continued sole, and unmarried, but in case she married again, then he bequeathed the same to his son, *Richard Monprivatt*, and his daughter, share and share alike, and in case either his son or daughter should happen to depart this life, before the event of his wife marrying, the whole to go to the survivor or survivors on their attaining the age of 21 years, or marriage: and reciting that the daughter had departed this life and that the said *Richard*

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PIKE *against* LEDWELL.

Richard Monprivatt the younger would be entitled to the said 400*l.* stock in case of his mother's marriage, or his attaining the age of 21 years, and that his said mother was desirous of advancing her son, and had agreed to sell and dispose of the sum of 400*l.* stock to *Josiah Pike* (the plaintiff) for 160*l.* to be transferred to the said *Josiah Pike*, when her said son should arrive at the age of 21 years, then stated the sale. The condition of the bond then was, that if *Ann Monprivatt* and *Richard Monprivatt* should within the seven days after the 11th day of *February* 1804, on which day he would be of age, well and truly transfer the said 400*l.* stock, or pay to *Pike* the value of 400*l.* consolidated Bank of England stock, on the said last-mentioned day, then the obligation to be void. The defendants then pleaded, 1st, *non est factum*, and 2dly, that it was corruptly against the form of the statute agreed by and between the plaintiff and the said *Richard Monprivatt* and *Ann Monprivatt* that the said plaintiff should lend and advance to the said *Richard Monprivatt* the son, the sum of 160*l.* and that he should forbear and give day of payment thereof to the said *Richard Monprivatt* the son, from the 5th day of *May*, in the year of our Lord 1801, until the 11th day of *February*, in the year of
[166] our Lord 1804, and that for and in consideration of such loan and forbearance, the said defendants, *Ann* and *Richard Monprivatt* the son, should bargain, sell, assign, transfer, and set over unto the plaintiff the said sum of 400*l.* 3 *per cents.* consolidated Bank annuities, in the said condition mentioned, and that the said defendants, *Ann* and *Richard Monprivatt* the son, should within seven days after the said 11th day of *February* 1804, well and truly transfer and make over to the plaintiff the said sum of 400*l.* three per cents. consolidated Bank annuities, in the same condition mentioned, or that the defendants should well and truly pay or cause to be paid to the plaintiff, his executors, administrators, or assigns, such sum or sums of money as the said sum of 400*l.* 3 *per cents.* consolidated Bank annuities should or would produce on the said 11th day of *February*, 1804, aforesaid, in case the same were sold.

Replication denying the usury.

The plaintiff proved the value of the stock, when the agreement was made, to be 240*l.* and at the time of the action brought 225*l.* being the current price of three *per cents.*

Erskine, for the defendant, contended, that under the circumstances stated, this was an usurious agreement. He admit-

1804.

PIKE *against* LEDWELL

ted, that where money was payable on a contingency, however small the apparent value given for it might be, such a contract could not be deemed usurious; that upon that principle, annuities purchased at low prices were held not to be usurious contracts, because the principal was sunk and gone; if, therefore, in this case, the plaintiff had bought *Richard Monprivatt's* [167] interest in the 400*l.* stock for 160*l.* or even for 60*l.* that could not be usurious, for that was completely contingent depending upon the event of his mother's marrying, in which event only he would have become entitled; but here was no contingency; he must have the 400*l.* stock; for Mrs. *Monprivatt*, in whom it was vested, had joined in the conveyance, and assigned it to the plaintiff. How, then, did the agreement stand? The stock was proved to have been worth 240*l.*, when the agreement was made. He paid for it 160*l.*; he got 80*l.* by his bargain, and the dividends in the mean time. He said he was aware how it might be put on the other side, that though the stock was worth 240*l.* when sold, it might suffer such a depreciation as to be by possibility only worth 160*l.* when he was to receive the transfer; that was to suppose the 3 *per cent.* consols to tumble to 20 or 30 *per cent.* it was an impossible supposition, and was only a cover and shift to conceal the true transaction, which was usurious.

Lord ELLENBOROUGH said, that whatever remedy the defendant might have in equity, on the ground of this being a catching bargain, he had none at law; contingency in the thing purchased was incompatible with the idea of usury, in which the principal must always be certain. It was admitted that if the stock when transferred to the plaintiff would be worth but 160*l.* it would not be usury; that the stock would not suffer that most extraordinary depreciation, was very improbable, but still it was within the reach of possibility. He therefore could not say, that there was not some contingency in the transaction, [168] and that the contract was not usurious..

Verdict for the plaintiff.

Gibbs and *Andrews* for the plaintiff.

Erskine, *Garrow*, and *Park*, for the defendant.

1804.

Tuesday, Dec. 4th.

HURD, Gent. *against* LEACH.

The month required by the stat. 2 *Geo.* 2. which an attorney's bill must be delivered before he commences an action to recover it, is a lunar month.

ASSUMPSIT to recover the amount of an attorney's bill for business done.

The business had been done in the years 1801, 1802 and 1803. Bills had been delivered at different times, but a general bill signed, containing the whole for which this action was brought, had been delivered on the 20th of *July*, 1804, the action had been commenced the 18th of *August* following.

The only defence was, that the action was commenced too soon: that by the statute 2 *Geo.* 2. c. 23, an attorney was prohibited from commencing an action until his bill had been delivered a month, and that the present action was commenced before the month expired; the bill being dated on the 20th of *July*, on which day it was delivered, so that the month did not expire until the 20th of *August* whereas the action had been commenced the 18th of *August* following

[169] It was answered by the defendant's counsel, that the bill had been delivered twenty-nine days, which was sufficient, the month required being a lunar one.

Lord ELLENBOROUGH, having referred to the statute, said, The words of the statute spoke of months generally; if it had said calendar months, it would have been a fatal objection; where the term month is used generally, its legal import is always taken to be lunar months. The word calendar not being there used, it must be taken that the statute applies to lunar months, and as a lunar month had expired before the action was brought, the action was brought in due time; and was therefore maintainable.

Verdict for the plaintiff.

Park and *Espinasse* for the plaintiff.

Garrow for the defendant.

1804.

EVERETT, q. t. *against* TINDALL.

Where several persons in a club join to buy a quantity of coals, and afterwards subdivide their shares, and the coals are delivered to each measure, each person cannot maintain an action for the penalty against the seller, for the contract of sale is joint.

THIS was an action on the statute, regulating the sale of coals; to recover the penalty for selling coals as and for pool measure, deficient in quality.

The declaration stated that the defendant being a dealer in coals, one *Samuel Johnson* bought of him 2½ chaldron of coals, as and for pool measure. That the defendant had delivered them, but that *they were on delivery found to be 13 bushels short of measure.

Johnson was called as a witness. His evidence was, that he was a member of a club, who subscribed a joint stock or capital for the purpose of buying a quantity of coals, which were divided afterwards in different proportions among the members; that the money was collected, and paid into the hands of one of the number, of the name of *Hattall*, who, when he received the money, purchased the coals from the defendant on their joint account; that 2½ chaldrons was his proportion, and which he had received by the delivery of the defendant's servants; but which on being measured, were found to be deficient. *[170]

Gibbs, of counsel for the defendant, on this evidence, objected, that it did not support the declaration, in which it was necessary to state the contract truly respecting the sale of the coals in the delivery of which fraud was imputed, subjecting the vender to a penalty. That the contract stated in the declaration was a separate contract between the defendant and *Johnson*; whereas the actual contract was either with *Hattall* or a joint one with allthe club.

It was answered, that there being a separate delivery of each member's share, it thereby became a separate contract with each, and that the contract was therefore truly stated.

Lord ELLENBOROUGH said, He was of opinion that it was a variance, and that it was a joint contract with all the members. If an action had been brought for not delivering the coals, all the members must have joined in the action, for there was no separate contract with each. [171]

The plaintiff was nonsuited.

Garrow and *Espinasse* for the plaintiff.

Gibbs and *Manley* for the defendant.

FISHER *against* FALLOWS.

Where a person becomes bail above for another, he is entitled to recover all the expenses he has been put to by reason of it, and may therefore recover his expenses in sending after the principal to take him, in order to render him; but not expenses of a suit improperly defended on such account.

ASSUMPSIT for money paid, laid out, and expended to the defendant's use.

Plea of the general issue.

The plaintiff's cause of action was this. In Hilary vacation, 1803, the defendant was arrested, at the suit of one *Buckee*: the plaintiff and one *Minter* became bail above for him and justified. The cause proceeded, and just before the time when the bail were liable to be fixed, they discovered that the defendant *Fallows* had absconded, and it was not known where to find him, in order to render him. The plaintiff, therefore, apprehensive of being called on to pay the money, in order to secure himself, by rendering the defendant; employed the defendant's nephew to go in search of him, in order that he might surrender him in discharge of himself and the other bail.

The nephew undertook the journey, and went to *Leicester* and *Ashby-de-la-Zouch*, where the defendant was found, and afterwards rendered. *Fallows'* *nephew charged for his trouble and expenses twelve guineas, which not being paid, he brought an action against the plaintiff for this sum, and the plaintiff afterwards paid it, together with the costs.

*[172]

The plaintiff now sought by this action to recover those two sums of twelve guineas and the costs, as having been necessarily expended on the defendant's account.

It was objected by *Garrow*, of counsel for the defendant, that no cause of action could arise out of this transaction; that the bail had no right to send in pursuit of the principal in the manner they had done, and to embark in a great expense, and that if allowed, it would sanction expense of every kind, however enormous; particularly as here there was no necessity for incurring so much expense, as the bail were not actually fixed, but took the step, in consequence of which so much expense had been incurred, *ex cautelâ*, only, from apprehension of their being likely to be so.

Lord ELLENBOROUGH. The relation of principal and bail is this: the principal engages to indemnify the bail from all expenses fairly arising from his situation as bail. I think the indemnity goes against all charges, which are necessary to secure themselves.

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FISHER *against* FALLOWS.

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themselves. The bail have a right to surrender their principal in their own discharge, and for their own security: if, therefore, the principal absconds, so that he cannot be had, the bail may take every proper and necessary step to secure him. In this case, *Fallows*, the nephew, was sent for that purpose: he has charged twelve guineas for his journey and expenses in securing the defendant, and which the plaintiff has been obliged to pay. I think he is entitled to recover that sum; but as for the costs of the action, brought by the nephew against him, and which he took defence to unadvisedly; he should have either defended that action, if the demand was unfounded, or paid the money if it could be legally claimed from him; but having defended that action without foundation, he cannot charge the defendant with the costs incurred in such an improvident defence.

Verdict for the plaintiff for twelve guineas.

Park and *Fell* for the plaintiff.

Garrow for the defendant.

Doe ex dem CASTLETON and Others *against* SAMUEL. *Dec.* 7, 1804.

Where a tenant by lease continues to hold after the expiration of it as tenant at will, and assigns to another, the tenancy of the assignees shall be held to commence at the day on which it commenced, under the lease, and a notice to quit on that day only is good, notwithstanding the assignee came in on a different day.

THIS was an action of ejectment, brought for the recovery of premises at *Hoxton*.

The plaintiffs were the committees of a lunatic, who was the lessor of the premises; the defendant was the tenant. They claimed to recover under a notice to quit, expiring at *Lady-day*. They proved their notice, and receipt of rent from the defendant's husband, *Thomas Samuel*, given as a year's rent up to that day, and there rested their case.

The answer given by the defendant was, that the holding in fact commenced at *Michaelmas*, so that the notice should have been to quit at that time. To *prove this, he gave in evidence a lease of the premises, made in the year 1763, to hold from *Michaelmas*. The original lessee having become bankrupt, his assignees assigned to one *Rogers*, *Rogers* assigned to one *James Samuel*. *Thomas Samuel*, the defendant's late husband, was brother to *James*, and came in under him, but not at the time when the first lease commenced, but on a different quarter-day.

The defendant proved the original lease as stated, and the

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CASTLETON *against* SAMUEL.

payment of the rent after the determination of the lease, at the same rate as that reserved by the lease.

Lord ELLENBOROUGH. A receipt for rent up to a particular day, is *primâ facie* evidence of the commencement of the tenancy at that day: but where a lease is made of premises, as was the case here, the production of the receipt, therefore, satisfied the plaintiff's case, and the tenant continues to hold on as tenant, with the consent of the landlord, after its determination; he holds as tenant from year to year, under the same terms as reserved by the lease, and the assignee who comes in under him holds also under the same terms. Of course, the tenancy from year to year must commence on the same day with that on which the lease began. In this case the lease began at *Michaelmas*, and the several tenants who hold in succession, hold under a tenancy commencing at that time; the notice here given to quit is at *Lady-day*; that is not the commencement of the term: the plaintiff must be nonsuited.

Garrow and *Abbott* for the plaintiff.

Gibbs and *Comyn* for the defendant.

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CHEEK, Gent. *against* ROPER.

To charge the drawer of an unaccepted bill, some actual evidence of a demand to accept on the drawee must be proved. It is not sufficient to call at the residence of the drawee, and the acceptance to be refused by a person who was unknown to the person calling.

ASSUMPSIT on a bill of exchange against defendant as drawer.

The declaration stated in the usual form, that the defendant drew his bill of exchange for 60*l.* on one *J. Hammond*, tanner, in *Bristol*, which was duly shewn, and presented to the said *Hammond* for his acceptance, &c. who refused to accept or pay the same, by reason whereof the defendant became liable.

To prove the fact of the bill having been presented to *Hammond* for his acceptance, the plaintiff proved, that the bill was sent by the witness, who was called, who carried it to the place which was described to him as *Hammond's* house, he offered it to some person in a tan-yard, who refused to accept it: but he did not know *Hammond's* person, nor could he swear that the person to whom he offered the bill was he, or represented himself to be so.

Lord ELLENBOROUGH said, that the allegation respecting the bill was a material one, as the drawer could only become liable

liable on the acceptor's default, which default must be proved. That the evidence here offered proved no demand on *Hammond*, and was therefore insufficient, so that the plaintiff could *not recover on the bill. Some evidence must be given of an application to the party first liable.

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CHEEK *against* ROPER.

*[176]

Park and *Manley* for the plaintiff.

Garrow and *Wigley* for the defendant.

NUTT *against* BUTLER.

ASSUMPSIT to recover the value of a milk-walk: the utensils belonging to it: for the use and occupation of certain apartments: with a count for goods sold and delivered.

Fixtures not separated from the freehold cannot be recovered under a count for goods sold.

The plaintiff proved the sale to the defendant of his interest in the milk-walk, for 14*l*. The plaintiff had lived in the house where he had carried on the business, to which the defendant succeeded, and on giving possession of it, with the business, to the defendant, he had left certain fixtures, consisting of grates and other articles fixed, for which the defendant was to pay.

The only question in the case was, whether the plaintiff could recover the value of the grates and other fixtures, under the count for goods sold and delivered; there being no count in the declaration particularly applying to them.

It was contended for the plaintiff, (Lord ELLENBOROUGH having intimated a contrary opinion on the opening of the case), that whatever it might be, as between landlord and tenant, as between the in-coming and out-going tenant, these things might be considered as goods sold, the out-going tenant having a power to remove them, and having given up that right to the defendant, who had enjoyed the benefit of them.

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Lord ELLENBOROUGH was of opinion, that being fixed to the freehold, and not a separate and undivided chattel, they could not come under the description of goods sold and delivered.

The plaintiff had a verdict on all the other counts.

Espinasse for the plaintiff.

Puller for the defendant.

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LEE *against* MEECOCK.

The day-book kept at the judgment-office is not evidence to prove the time of the signing of a judgment.

CASE for giving a false character of one *Sears* to the plaintiff, in consequence of which the plaintiff trusted him with goods, for which *Sears* had not paid.

The plaintiff's case was, that at the time of defendant's having given to *Sears* the character, and which induced the plaintiff to trust him, *Sears* was in the defendant's debt, and he had taken *Sears's* warrant of attorney to secure himself, upon which he afterwards entered judgment, and taken *Sears's* effects in execution; by which the plaintiff lost the money due for the goods he had sold to *Sears*.

To prove the time of signing the judgment, the plaintiff
[178] called the officer of the Judgment-office to prove the time of signing the judgment: he produced a book from the office, in which were several entries; being asked what the book was, he said, it contained entries of judgments interlocutory and final; bills and latitats, attachments, &c. to save the statutes of limitations; *scire facias's* to revive judgment issues, &c. It is called the day-book, from whence the entries are carried into the docquet-book.

It was objected, that this was not the best evidence, that an office copy of the judgment ought to be produced, or the docquet of the judgment.

LAWRENCE, J. ruled the book to be inadmissible.

Erskine and *Manley* for the plaintiff.

Garrow and *Gibbs* for the defendant.

AT GUILDHALL.

SITTINGS AFTER TERM.

MALLET *against* THOMPSON.

Dec. 9th.

ASSUMPSIT by the plaintiff, as indorsee of *Twigg*, who was the payee of a promissory note made by the defendant payable to *Twigg's* order.

Erskine, for the defendant, stated his defence to be, that *Thompson*, the defendant, had only lent his name to accommodate *Twigg*, by drawing the note in favour of *Twigg* without any consideration* whatever from him, but merely to accommodate him; that it was known to the plaintiff at the time that the fact was so, and he took the note with full knowledge, that defendant had no value for it; that when it became due, *Twigg* had become insolvent, and assigned his effects, by deed, to trustees for the benefit of his creditors. That the plaintiff executed the deed of assignment of *Twigg's* effects; that the deed contained a covenant whereby the plaintiff covenanted (in consideration of a composition on his debt) not to sue, or otherwise molest *Twigg* on account of the debt for ninety-nine years; and that he afterwards received a dividend on *Twigg's* estate; notwithstanding this, and after receiving the composition from *Twigg*, the plaintiff brought this action against *Thompson* as maker of the note.

He contended, that to allow the plaintiff to support the present action would be to allow him to defeat his own covenant, by his own act; for that if the plaintiff was allowed to recover against *Thompson*, *Thompson* would have a right of action over against *Twigg*, after he had paid the money, the note having been made on *Twigg's* account; the consequence would,

The holder of an accommodation note who has received a composition covenanted not to sue the indorsee for whose accommodation the note was made, may notwithstanding sue the maker, though on payment of it he will have a right of action against the indorsee.

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MALLET *against* THOMPSON.

would, therefore, be, that *Twigg* would be molested for the debt, contrary to the plaintiff's covenant with him.

Lord ELLENBOROUGH. *Twigg* may be molested, but not by the plaintiff; taking the statement as made by the defendant's counsel to be proved; the deed stands unbroken, for the plaintiff (as he covenanted) does not sue or molest *Twigg*, which is all that he has covenanted to do; it is true, that the [180] plaintiff recovering on the defendant in this case, he may have his action over against *Twigg*, but it will be for money paid to his use, at the defendant's suit; the payment creates a new debt, but the old debt is satisfied, as between *Twigg* and the plaintiff. A deed cannot be carried farther than the plain import of it, between the parties.

Gibbs for the plaintiff. The covenant in the deed of the plaintiff could not be pleaded to *Thompson* the defendant's action against *Twigg*.

Verdict for the plaintiff.

Gibbs and *Barrow* for the plaintiff.

Erskine for the defendant.

LEVY *against* WILSON.

If a bill is indorsed by procuration, it should be so stated in the declaration; for if the declaration states that the party indorsed it, his own proper hand being thereunto subscribed, and it appears to have been done by procuration, from such party, it is a fatal variance.

ASSUMPSIT by the plaintiff as indorsee of a promissory note drawn by the defendant, payable to *Michael Jendwin's heir*, or order, and by one *Sazonoff*, by procuration from *Michael Jendwin's* heir, indorsed to *Jacob Samuel;* and by *Jacob Samuel* to the plaintiff. The declaration stated, that the defendant drew the note payable to *Michael Jendwin's* heir, or order, and that he indorsed it, *his own hand-writing being thereunto subscribed.*

Erskine, of counsel for the defendant, having stated the facts to be as above stated, respecting the mode of indorsement, objected, that if the indorsement was stated to have been by Mr. *Jendwin's* heir *in writing* generally, the declaration might have been* good, even though it appeared to be indorsed by procuration: but in this case, the declaration stated to be indorsed by *Michael Jendwin's* heir, *his own proper hand-writing being thereunto subscribed*, which was stating it to be done by himself; whereas the actual indorsement was by *Sazoff*, by procuration

*[181]

from

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from *Michael Jendwin's* heir, which he contended was a clear variance from the declaration.

It was answered, That the averment in substance was the indorsement, which conferred a title to the bill on the plaintiff, and the mode in which that was done was form only.

Lord ELLENBOROUGH said, That could not be called matter of form which if negatived could defeat the plaintiff's action; that it was matter of substance, to state the indorsement truly; for if the declaration stated the indorsement, as in fact it was, by procuration, the defendant might shew that there was no such procuration or authority given. That in every action by the indorsee of a bill, the hand-writing of the first indorser was necessary to be proved, to shew that he had put the bill into circulation; if, therefore, there was no procuration to the first indorsement, though stated to be so, there was no authority to put the bill into circulation; and that would be an answer to that action.

When the bill was produced, it appeared to be indorsed, not by *Michael Jendwin's* heir himself, but by *Sazonoff*, by procuration from *Michael Jendwin's* heir; his Lordship, therefore, directed the plaintiff to be nonsuited.

Gibbs, *Park*, and *Reader*, for the plaintiff. [182]

Erskine and *Garrow* for the defendant.

WADDINGTON *against* FRANCIS.

Where an agreement between several parties is offered in evidence, and it is objected to on the ground that it is not sufficiently stamped, by reason of the omission of a stamp, proof of that lies on the defendant, who makes the objection, it being a fact.

THIS was an action of *assumpsit* on a special agreement, by which the plaintiff agreed to purchase from the defendant, and the defendant agreed to sell to the plaintiff, the produce of twenty-three acres of hops, then growing on the defendant's lands near *Canterbury*, at the rate of 10*l.* per cwt. for the whole growth.

The breach assigned was the non-delivery.

The case opened by the plaintiff was, that Mr. *Waddington*, the plaintiff, who at that time was a dealer in hops, to a great extent, had at *Canterbury* entered into an agreement with different growers of hops in the county of *Kent*, then assembled at market, to purchase their respective growths; that he entered into the agreement in question with the defendant for his growth,

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WADDINGTON *against* FRANCIS.

growth, which was twenty-three acres. This agreement was in writing, prepared at the time, and executed by all the parties, and by the plaintiff.

The plaintiff produced the agreement which had been entered into; it was signed by nine persons, who had so contracted to sell, one of whom was the defendant, and by Mr. *Waddington*. By the agreement, the several persons whose
[183] names were subscribed, agreed to sell their crops of hops, then growing on the number of acres attached to their respective names, at the price mentioned in the agreement, and opposite to the name of each. The number opposite to the name of the defendant was twenty-three, which was explained to denote twenty-three acres, as being the number of acres the growth of which he had sold.

It was stamped with as many agreement stamps as there were names subscribed, *except two*, but which two names appeared to have been erased.

Dallas, of counsel for the defendant, objected, that the paper could not be admitted in evidence, unless the plaintiff proved that the two names which were erased, had been struck out before the agreement was stamped; that the paper purported to be an agreement between the plaintiff and the several parties whose names were to it; was, therefore, a distinct agreement as to each of the parties, requiring a distinct stamp for each of the contracting parties. If, therefore, the stamps were on when all the names signed the agreement, there would be two stamps less than there were parties, and the agreement then would not be stamped with a distinct stamp for each name.

It was answered, That all that could be looked to was, whether there was an agreement for the sale of the hops between the parties to the action, and whether it had a proper stamp. Here, there was a paper produced properly stamped, with the stamp appropriated to an agreement, and if there was any ob-
[184] jection on account of the stamp, it would be shewn by the defendants.

Lord ELLENBOROUGH said, He was to take the instrument as he found it; it was an agreement between the plaintiff and the defendant, as well as several others. He could not make presumptions on the one side or the other; as presented to him in evidence, there was on the face of the paper a sufficient number of stamps for the names on the instrument, and a stamp opposite to the defendant's name, and that was sufficient. But

if

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if there was any thing in the objection, the proof of it lay on the defendant, whose objection was founded on a matter of fact, whether the names were on it at a particular time or not.

Verdict for the plaintiff.

Erskine, *Garrow*, and *Reader*, for the plaintiff.

Dallas, *Pitcairn*, and *Abbot*, for the defendant.

SITTINGS AT GUILDHALL.

VISGER *against* PRESCOTT.

Dec. 1st.

Neutral property taken by a King's ship, though the Court of Admiralty pronounce for good cause of seizure, but order to be restored, is lawful object of insurance.

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THIS was an action on an open policy of insurance, on goods intended for *Leghorn*, at and from *New York* to *Gibraltar*, beginning the adventure from the loading thereof, on board the *Fox*, in *New York*; the risk to cease after the ship should have been safely moored twenty-four hours in *Gibraltar Bay*; unless orders were received by the captain at *the time of his arrival, to land the goods at *Gibraltar*, in which case, the risk was to continue as usual, until the goods were landed. The goods were averred in the declaration to be shipped on the account of *S.* and *A. Felicitig* and *Co.* of *Leghorn*, and the loss was stated to have happened before the ship's arrival at *Gibraltar*, in the first count by capture, and in the second count by the arrest, restraint, and detainment of persons on board of a sloop of war belonging to the King.

The facts, as they appeared from the admissions, were, That the *Fox*, with the goods insured on board, set sail from *New York*, on the 1st of *June*, 1803, bound on a voyage to *Leghorn*, the captain having orders to touch at *Gibraltar* for information on the subject of war between *England* and *France*; and if, on his arrival at that place, such a war existed, and he could not proceed to *Leghorn*, he was then to sail with the goods insured to *Genoa*, *Naples* or *Palermo*; that Messrs. *P.* and *A. Felicitig* and Co. were inhabitants of *Leghorn*, and carried on the business there as merchants.

That at the time of the ship's sailing from *New York*, and also

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VISGER against PASCOTT.

also at the time of the capture, *Leghorn* was garrisoned by French troops, though when the goods were loaded on board the *Fox*, at *New York*, the shipper did not know that a war had broken out between *England* and *France*: that, on the 12th of *July* following, the *Fox* was captured by His Majesty's brig *Le Victoreuse*, and carried into *Gibraltar* on the 15th of the same month. That proceedings were instituted there in the
[186] Vice-Admiralty Court, the sentence of which, after restoring the *Fox* and all the cargo, but the goods in question, stated: That forasmuch it appeared doubtful, under all the circumstances of the case, whether the property of the inhabitants of *Leghorn* was liable to be treated indiscriminately as the property of citizens of the French Republic; the Judge was pleased to reserve the final adjudication of the goods in question for the space of six months, for further information respecting such doubts, and pronounced for just cause of seizure of the said brig and goods, and directed freight to be paid to the master, and also the captor's expenses to be charged on the said goods so reserved: that on the 20th of *August* following, a commission was issued for unloading the goods, and for the sale of them by public auction, and that, on the 14th of *February*, 1804, a final decree was made, which directed that the goods, or the value thereof, should be restored to the owners, *P.* and *A. Felicitig*, subjects of his Majesty the King of *Etruria*, and pronounced for just cause of seizure.

Upon these facts, the plaintiff claimed for a total loss.

On the part of the defendant, it was objected, that this action could not be maintained; because it appeared from the provisional and final sentence, that there existed a just cause of seizure, and although the underwriters insure against capture generally, yet such an insurance cannot extend to captures for just cause by a *British* ship, according to the doctrine laid down in *Kellner* v. *Le Mesurier*, 4 *East*, 396; in which it was held,
[187] That a policy on a foreign ship must be understood as containing an exception of all captures made by the authority of our own Government.

But Lord ELLENBOROUGH, C. J., said, That when the Vice-Admiralty Court pronounced for just cause of seizure, they did not adjudge that the goods insured were goods condemnable: that the capture in this cause was a capture of neutral property, and that the insurance thereon contravened no policy of the state which constituted the principal difference between this case and that which had been cited.

The

The plaintiff had a verdict for a total loss.
Gibbs and *Casberd* for the plaintiff.
Erskine and *Park* for the defendant.
Ex relatione Casberd.

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VISGER *against* PASCOTT.

IN THE COMMON PLEAS.

SITTINGS AFTER TERM.

WYATT, Assignee of ALGAR, *against* WILKINSON and Another.

Dec. 15th.

THIS was an action of *assumpsit* for money had and received, brought by the plaintiff as assignee of *Algar*, a bankrupt, to recover a sum of money received by the defendant subsequent to an act of bankruptcy committed.

*The plaintiff proved that the bankrupt had shut up his shop, and absconded, on the 7th of *November*, and thereby established an act of bankruptcy on that day.

The defendant before that time having sold goods to the bankrupt, and for which the bankrupt was then indebted to him, prevailed upon him to return part of the goods, and to pay him for the rest. This payment being made subsequent to the bankruptcy, and with knowledge of the bankruptcy, the object of the present action was to recover it back.

To prove this fact, the bankrupt (having obtained his certificate and released) was called by the plaintiff's counsel. He proved the fact as above stated, as well as to the transaction itself, as to the time and circumstance when it took place.

Best, Serjt. for the defendant, in his cross-examination of the bankrupt, asked him, Whether he had not, prior to the time of his returning the goods, and paying for the others, been in difficulties as well as long before the 7th of *November*? and Whether, in fact, he had not been denied to a creditor a considerable time before?

The rule that a bankrupt cannot be examined as to any matter necessary to support his bankruptcy applies as well to cross-examination as to examination in chief. He, therefore, on examination cannot be asked a question as to the fact of any act of bankruptcy committed prior to that on which the commission is founded.

*[188]

It

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WYATT *against* WILKINSON.

It was objected to by the plaintiff's counsel, that such question could not be legally asked; that it was a settled rule of evidence that the bankrupt could not be called to prove his own act of bankruptcy, or any thing connected with it.

It was on the other side admitted, that he could not be called, by either party, to prove his bankruptcy, on his examination in chief, but that being called by one party and examined in chief, it was contended, that on his cross-examination, he might be asked questions, the effect and tendency of which might be to establish an antecedent act of bankruptcy.

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CHAMBRE, J., ruled, that there was no such distinction as that contended for; that it was settled; no question could be asked from the bankrupt the object of which was to support his own bankruptcy; and whether in his examination in chief, or on his cross-examination, it made no difference.

Verdict for the plaintiff.

Shepherd, *Bailey*, Serjts., and *Espinasse*, for the plaintiff.

Best, Serjt. and *Lawes* for the defendant.

THE END OF MICHAELMAS TERM.

CASES

ARGUED AND RULED

1805.

AT

NISI PRIUS,

HILARY TERM, 45 GEO. III.

AT WESTMINSTER.

SECOND SITTING-DAY IN TERM.

SHIPPEY *against* DERRISON.

THIS was a special action on the case to recover damages for breach of an agreement stated in the declaration, by which the defendant agreed to take certain premises for a term of fifteen years.

It was admitted that there was no note in writing of the agreement, as to the term which was to be granted.

To prove the case, the plaintiff called a Mr. *Thackray*, an attorney; he stated, that he was employed to prepare a lease from the plaintiff to the defendant for a term of fifteen years; he said, he considered himself as employed by both parties, as he was to be paid by both. That he prepared a draft of a lease, but which he sent to an attorney for perusal on the part of the defendant, who made some *alterations in it, and returned it. That soon after, the defendant finding himself unable to perform the agreement, applied to the plaintiff to cancel it; the plaintiff had no objection, upon being indemnified against the expense and inconvenience he had been put to; but before he would

If a party has entered into a parol agreement for a lease, and a draft of it is prepared, though the agreement is void under the statute of frauds, yet by an indorsement referring to the case, on the draft by the party, admits the agreement, it being in writing is sufficient within the statute.

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SHIPPEY against DERRISON.

would try to let it again, he required the defendant to relinquish the agreement by writing; the defendant accordingly wrote on the draft of the lease,

"I hereby request Mr. *Shippey* (the plaintiff) to endeavour "to let the premises to some other person, as it will be incon- "venient to me to perform my agreement for them, and for so "doing this shall be a sufficient authority.

"*J. Derrison.*"

The defendant having refused to make any compensation, the action was brought, and on the above facts being given in evidence, *Garrow* objected that the plaintiff should be non-suited.

That the foundation of the action was an agreement for a term of fifteen years; that this agreement was void in itself, as the statute of frauds required a note in writing, which in this case had not taken place, as it was admitted, that when the agreement for the lease was entered into, there was no note in writing whatever.

The plaintiff's counsel contended, That the draft of the lease produced satisfied the statute, and was a note in writing, as it contained the term of years to be granted, the parties, and every thing necessary to constitute a valid lease; and though [192] it was objected, that it was not signed by the parties themselves, or by their agents properly authorized. That, in fact, was so signed by the defendant's agent, by Mr. *Thackray*, who was employed by both parties.

To this it was answered, That though *Thackray* so represented himself, that, in fact, he also admitted that he was first retained by the plaintiff, and so little was he to be considered as agent for the defendant, that the defendant did not rely on him at all, for the draft was sent to another attorney to peruse on the part of the defendant, and he made alterations in it.

Lord ELLENBOROUGH interrupted plaintiff's counsel, and said, that though this might apply to the draft, the indorsement on the deed was actually signed by the defendant *Derrison* himself, in which the agreement was mentioned, and that this threw the weight of the case on the defendant. *Garrow* then contended, that the indorsement could not be construed as an agreement. It had been contended, that the draft was the agreement that was in the teeth of a case from *Peere Williams*, of *Hawkins* v. *Halmes*, i. *P. Williams*, 770, which decided that such a draft could not be considered as a note in writing within

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SHIPPEY *against* DERRISON.

the statute. That it was void, as the indorsement was made after the agreement was at an end. That the indorsement could not set up that which was void in law. It was done only to satisfy the scruples of the plaintiff previous to the sale.

He then cited the case from *Peere Williams* when on a contract for an estate, a draft of the conveyance having been sent by the seller to the buyer, he had settled the draft, made alterations, and returned it. It was held not to be a note in writing [193] within the statute of frauds.

Lord ELLENBOROUGH. It is not necessary that the note in writing, to be binding under the statute, should be cotemporary with the agreement. It is sufficient if it has been made at any time, and adopted by the party afterwards, and then any thing under the hand of the party, expressing that he had entered into the agreement, will satisfy the statute which was only intended to protect persons from having parol agreements imposed on them. In this case, the indorsement says, that he was unable to perform the agreement for the premises, and it is written on the draft of the lease of those premises, which had been perused and altered by his own attorney. It is sufficient with respect to the case from *Peere Williams*, to observe, that was an agreement purely executory, and nothing more than the bare draft of the lease, which was not signed by the party.

Verdict for the plaintiff.

Erskine and *Marryat* for the plaintiff.

Garrow for the defendant.

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KELBY and VERNON *against* STEEL.

Three persons bind themselves jointly and severally in a bond of indemnity, and two of them pay the whole money, they cannot join in an action for contribution against the third.

THIS was an action of *assumpsit* brought by the two plaintiffs against the defendant for money paid to his use.

Plea of *non-assumpsit*.

The circumstances of the case were these. The two plaintiffs, and the defendant, in the year 1802, had issued writs of *fieri facias*, directed to the sheriff of *Wiltshire*, to levy the sums mentioned in their respective writs, on the effects of one *John Steel*. One *Prater* claimed the goods under a bill of sale from *Steel*. To induce the sheriff to sell the goods under their writs, the plaintiffs and the defendant joined in a bond to the sheriff,

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KELBY against STEEL.

by which they bound themselves jointly and severally, to indemnify him against any action which *Prater* might bring against him as sheriff, for proceeding to a sale under their writs. The sheriff, in consequence of this indemnity, sold the effects under the several writs of execution, and paid the money over to each of them. *Prater* afterwards brought an action against the sheriff, and recovered the value of the goods, having established the validity of his bill of sale: in consequence of which the sheriff was forced to pay over to *Prater* the amount of those levies which he had made under the several writs of the plaintiffs and the defendant, against which he had been indemnified.

The sheriff then called upon the parties, under their bond to
[195] repay to him the several sums levied, which he had so paid over to them under their several executions, and the plaintiffs in this action paid the whole amount of their levies to the sheriff, and also that of defendant. The present action was, therefore, brought by the plaintiffs to recover the amount of the sum paid by them on the defendant's account, being what had been received by him on account of the money levied under his *fieri facias*, and paid to him by the sheriff.

The receipt was given in evidence as given by the sheriff, and it was a joint receipt in these words; "Received from *Kelby* and *Vernon* (the present plaintiffs) the sum of *l.* being payment by them of the whole sum levied under the several writs;" specifying them, and which included the defendant's.

It was objected by the defendant's counsel, that the action could not be maintained. It was a joint action for money paid by both, to the defendant's use; but the payment of each was distinct, each paid his own money, and each should have, therefore, brought a distinct action. It was stated, that the point had been already decided in a case of *Brand* and another v. *Boulcott*, 3 *Bos.* and *Pull.* 235, in the Common Pleas, in which case there were three assignees of a bankrupt's estate, and two having paid the solicitor's bill, and having brought a joint action against the third, for contribution, the Court of Common Pleas held the action in that form not to be maintainable.

It was answered, by the plaintiffs' counsel, that the cause in the Common Pleas was on an implied promise; here it was under a joint security by bond; the parties had by their deed
[196] made themselves jointly liable, and were so entitled to sue. That the contract specified followed the nature of the payment, which was by both, as the receipt was given in their joint names.

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KELBY *against* STEEL.

Lord ELLENBOROUGH. The receipt being joint cannot alter the nature of the transaction, and the mode of payment cannot affect it; though they entered into a joint bond to the sheriff, it was for their respective securities, and for their separate debts; the words of their original contract are to be taken as for their separate account, and the case in the Common Pleas is decisive.

The plaintiff was nonsuited.

Erskine, *Park*, and *Lawes*, for the plaintiff.

Garrow for the defendant.

AT WESTMINSTER.

SITTINGS AFTER TERM.

Doe ex dem. Lord MACARTNEY *against* J. CRICK and WILLIAM CRICK.

Feb. 15th, 1805.

THIS was an action of ejectment to recover possession of premises at *Chiswick*. The defendants had held under a lease from Sir *Charles Boughton Rous*, from whom the lessor of the plaintiff purchased. The tenancy was admitted to have commenced at *Old Michaelmas*, and the plaintiff claimed a right to recover, under a notice to quit given in the following manner.

Notice to quit may be given to a tenant by parol, and where there are two tenants of premises held in common, notice to one is sufficient.

**William Crick*, one of the defendants, was sent for by Lord *Macartney*, the lessor of the plaintiff, when he was informed verbally by Lord *Macartney* that he should want the premises which he and his brother held, to take into his own occupation, and that he should expect him then to quit; but that if it would be any convenience to him, he would permit the defendants to occupy till *Christmas*, and that they should pay no rent. The defendant, *William Crick*, expressed himself well satisfied and grateful for the indulgence.

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Lord MACARTNEY *against* CRICK.

After this conversation, a written notice dated 8th of *April*, was on that day served on the defendants to quit at *Christmas*.

It was objected for the defendants, 1st, That though the parol notice might be good, as to a moiety, it being given to one defendant only, it could not entitle the plaintiff to recover the other moiety of the premises, against the defendant, who had not had notice; for as to the written notice it could not affect him, as the tenancy commenced at *Michaelmas*. 2dly, That a parol notice was not sufficient.

Lord ELLENBOROUGH over-ruled both objections, and said, a written notice was by no means necessary; and with respect to the notice, as the two defendants appeared to hold the lands jointly, service of notice to quit on one was sufficient. The defendants had had nine months' notice to quit when entitled to but six. The notice was given on the 8th of *April*, which was six months before the time when the tenancy was admitted to have commenced.

[198] Verdict for the plaintiff.

Park and *Beckett* for the plaintiff.

Garrow and *Espinasse* for the defendants.

LYNBUY *against* WEIGHTMAN.

To bind a bankrupt by a new promise to pay, subsequent to his bankruptcy, it must be a precise and positive promise to the plaintiff, and not given in general terms that he would pay every body 20*s.* in the *£*.

ASSUMPSIT for money lent.

Pleas of the General Issue and Bankruptcy.

The plaintiff meant to rely on a new promise to pay, made by the bankrupt subsequent to his bankruptcy, and for that purpose was giving evidence of general declarations by the bankrupt, that he would pay every body, and that his effects would pay twenty shillings in the pound, but there was no specific promise whatever proved to have been made to the plaintiff.

Lord ELLENBOROUGH said, That in order to bind a bankrupt by a new promise, he should expect a positive and precise promise to pay, not given in such general terms as it was offered here.

A juror was withdrawn by consent.

The *Solicitor-General* and *Lawes* for the plaintiff.

Garrow for the defendant.

1805.

AT GUILDHALL.

SITTING-DAY AFTER TERM.

PARSONS *against* CROSBY. *Feb.* 14th, 1805.

ASSUMPSIT for goods sold and delivered.

The defence intended to be set up to nonsuit the plaintiff was, that he carried on business in partnership with his son, who should, therefore, have joined in the action.

The son was called as a witness for the plaintiff.

He was asked, on his *voire dire*, Whether he was not a partner in business with the plaintiff his father? He said, he was not, nor had he any share or interest in the profit; but, upon his further examination, he admitted that the business was carried on under the firm of *Parsons* and *Son*, which word *Son* meant himself; that books were printed so in their joint names, of *Parsons* and *Son*; that bills of exchange were so drawn on them, and accepted by the witness himself when addressed to *Parsons* and *Son*. But, on his re-examination, he positively denied having any share in the business, or deriving any advantage as a partner. His inadmissibility was contested, and contended that by his own evidence he had proved himself a partner.

A person who suffers his name to be used in a firm as a partner, if in fact he is not so, nor has any share in the business or profits, may be a witness for the person whose name is joined with his, and who is the only person entitled in action for goods sold.

Lord ELLENBOROUGH. However he might have made himself a partner to the world, by allowing his name to be so publicly used, and by accepting bills drawn as he has described, that can only affect himself. But that is not the question here; it is, Has the witness any interest in the present question? That depends upon whether he is to be benefited by the decision of this question; he cannot be affected by it, if he is not, in fact, a partner; he has denied it, and though it may go to his credit, it will not render him incompetent.

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Verdict for the plaintiff.

Erskine and for the plaintiff.

Garrow for the defendant.

1805.

IN THE KING'S BENCH.

SITTING AT GUILDHALL.

Feb. 28th, 1805.

STEVENSON et Al. Assignees of KNIGHT, a Bankrupt, *against* WOOD.

Money paid for rent to a landlord who was about to distrain, by a trader after an act of bankruptcy committed, is not recoverable back by the assignees.

THIS was an action of *assumpsit* for money had and received by the defendant, and brought by the plaintiffs as assignees of *Knight*, a bankrupt. The action was brought to recover back a sum of 30*l.* which had been paid to the defendant after an act of bankruptcy, and under the following circumstances:

Knight, the bankrupt, had carried on the business of a grocer in *Canterbury;* he had also a *house at *Whitstable;* the defendant was landlord of the latter house.

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The bankrupt having got into difficulties, had left his house in *Canterbury* on the 25th of *April*, 1804, on the pretext of looking after some goods which he had ordered; but, in fact, he had then left his house from a fear of being arrested, and from the disordered state of his affairs.

The rent of the premises which he held of the defendant afterwards becoming due, the defendant had applied for the payment of it; after some delay, and talking about a distress, the rent was paid, but no distress was ever made. The action was brought to recover back this money.

Park, for the plaintiff, stated, as the ground of the assignees' right to recover, that all money paid by a bankrupt, after a secret act of bankruptcy, was recoverable back by the assignees, except in the particular and excepted cases protected by the statute 19th *Geo.* II. that the cases arising under that statute protected payments only made on bills of exchange or goods sold; that this, therefore, did not come within either of the cases, and, therefore, was recoverable.

1805.

STEVENSON *against* WOOD.

The *Solicitor-General* relied upon the defendant's right to hold the money, independent of the statute, or any protection to be derived from it; the ground of law which he took was this, that under the bankrupt laws the landlord had a right to distrain for rent in arrear, and the goods of the bankrupt were subject to the distress, notwithstanding the act of bankruptcy. That the assignees took the goods subject to the prior title of the landlord, to whom they were bound to pay his rent, before they could remove the goods, otherwise the landlord had a right to distrain off the premises: that having that right, he had a power to waive it, and to accept the rent, in lieu of his right to distrain. That he had been prevented from using that right here by the assignees paying him the rent, but having the effect of it, by the payment of the rent he was entitled to hold it.

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Lord ELLENBOROUGH assented to the law as laid down by the *Solicitor-General*. His Lordship said, The landlord has by law a right of distress; he has a legal lien on the bankrupt's goods, unconnected with the bankruptcy; if he thinks fit to waive that right, and accept of the rent from the assignees, who may be benefited by having the goods, without being sold under the distress, the landlord should not be placed in a worse situation than if he had made an actual distress; it would be a fraud on his legal rights to hold otherwise. The defendant has, therefore, a right to hold the money which under those circumstances he has obtained.

Verdict for the defendant.

Park and *Espinasse* for the plaintiff.

Solicitor-General, *Garrow*, and *Pitcairn*, for the defendant.

1805. IN THE COURT OF EXCHEQUER. (a)

Friday, *May* 17th.

WRIGHT, Esq. *against* SMITH.

When a tenant has held over possession after the expiration of his term, and the landlord recovers the possession by ejectment, he cannot afterwards maintain an action of debt under stat. 4 *Geo.* 2. *c.* 28, for the double value.

THIS was an action of debt, under the statute of 4 *Geo.* 2. *c.* 28, to recover double the yearly value of certain lands in the parish of *Wickham Bishops*, in the county of *Essex*. The action was brought by the plaintiff, who was the landlord, against the defendant who had been the tenant.

The declaration was in the common form, stating that the defendant held the lands in question as tenant to the plaintiff from year to year; that the plaintiff on the 24th day of *March*, in the year 1803, gave the defendant notice in writing to quit the said lands on the 29th day of *December* following, (which was the end of this year), but that the defendant not regarding the statute, &c. did not on the determination of the said term deliver up the possession of the premises to the plaintiff according to the notice given, but wilfully held over the same, by reason of which, and by force of the statute, the defendant became liable to pay to the plaintiff the double value, &c.

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The cause came on to be tried at the Lent Assizes for *Essex* in *March*, 1805, before HOTHAM, B., when a verdict was found for the plaintiff, subject to the opinion of the court, upon the following case, with liberty to turn it into a special verdict if either party thought fit.

That *John Wright*, the elder, Esquire, being seised (amongst other things) of the premises mentioned in the declaration, which consist of a manor house and farming buildings, with nearly 500 acres of land, by indenture of lease dated the 10th of *October*, 1782, and made between the said *John Wright* of the one part, and the defendant *Josiah Smith* of the other part; in consideration of the rents and covenants in such lease ex-

(a) Though the above case is not a determination at Nisi Prius, but of the Court of Exchequer, upon argument; yet having occurred on the Circuit, and containing a point of law of much importance, I have thought fit to insert it here.

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pressed, demised and leased the said premises to the defendant, to hold from *Michaelmas* then last, for the term of twenty years, at the yearly rent of 234*l.* payable half-yearly.

That the said *John Wright*, by his last will and testament, in writing, dated the 6th of *March*, 1783, and duly executed for passing real estates, gave and devised (amongst other things) the premises mentioned in the declaration (subject to a rent-charge of 250*l.* to the testator's daughter, *Ann Luard*, for her life) to the use of the testator's son *John Wright*, and his assigns, during the term of his natural life, with remainder (after other uses which are since determined) to the use of the testator's grandson, *Peter Luard*, (who had taken the name of *Wright*), the now plaintiff, and his assigns, during the term of his natural life, with divers remainders over. And the testator by his will declared as follows: Also my will is, that it shall and may be lawful for my said son, and my said grandsons and daughters, whether covert or sole, respectively, as and when they shall come into and be in the actual possession of my said estates and premises, or any part thereof, by indenture under their respective hands and seals, to demise and lease the same, or any part thereof, whereof they shall be respectively in the actual possession, except the manor of *Hatfield Priory*, and the mansion house and demesne lands thereto belonging (which were no part of the premises in question) unto any person, or persons, for any term or number of years, not exceeding twenty-one years in possession, and not in reversion, remainder, or expectancy, "So as upon every such lease there shall be reserved, and made payable during the continuance thereof respectively, the best improved rent that can reasonably be had for the same, without taking any sum or sums of money, or other thing by way of fine, for or in respect of such lease or leases," and so as none of the said leases shall be made dispunishable of waste, by any express words, and that in every such lease there be contained a clause of re-entry for non-payment of the rent or rents thereby respectively reserved, and that such lessee or lessees seal and deliver counterparts of such lease or leases.

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That the said *John Wright*, the testator, died in the year 1787, without revoking or altering his said will, whereupon *John Wright*, his son, first devisee for life, entered into possession, and the receipt of rents and profits of the premises so leased

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leased to the defendant, and continued in the possession and receipt thereof until the time of his death.

That by indenture of lease, dated the 25th of *May*, 1791, and made between the said *John Wright*, the son, of the one part, and the defendant of the other part, the said *John Wright*, the son, in consideration of the surrendering and yielding up by the defendant of the said indenture of 10th of *October*, 1782, and of the rents and covenants expressed in such new indenture of lease, demised and leased the premises mentioned in the said declaration to the defendant, to hold from *Michaelmas* then last, for the term of twenty-one years, at the yearly rent of 250*l.* payable quarterly, and under the like covenants, provisoes, and agreements, in all respects as were expressed in the said former lease. Amongst other covenants on the defendant's part in both the before-mentioned leases, was one for doing the repairs at his own expense on being allowed rough timber; and another for providing a dinner for the manor steward and officers on their annual court day, the expense of which dinners amounted to about 20*l.* *per annum.*

That the premises comprised in the before-mentioned leases were, on the 25th of *May*, 1791, reasonably worth the annual rent of 400*l.* under such covenants as are contained in the said leases.

That the said *John Wright*, the son, died in the year 1796, without issue, whereupon the before-mentioned estates came to the same *Peter Luard*, the grandson and next devisee for life named in the said testator's will, who by his Majesty's royal [207] licence and authority then took upon himself the surname of *Wright* only, and entered into receipt of the rents and profits of the said premises, and the defendant regularly paid him the rent reserved by the last-mentioned lease, from the death of the said *John Wright*, the son, down to, and inclusive of, that which became due at *Lady-day*, 1802, which was the expiration of the twenty years originally granted.

That the plaintiff alleging that the lease so executed by *John Wright*, the son, was not consistent with the power of leasing given him by the testator's will, inasmuch as the best improved rent that could be reasonably had for the premises had not been reserved thereby, claimed to have such lease delivered up and vacated; but the defendant insisting on the validity of such last mentioned lease to him as warranted by the said power, and that no fraud or collusion had been used in the obtaining it:

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it: the plaintiff, on the 24th of *March*, 1802, caused the defendant to be served with a notice requiring him to quit and deliver up the possession of the premises at *Michaelmas* then next; and the plaintiff being uncertain, whether he was bound to consider the defendant as tenant under that lease, or as tenant from year to year, on the 25th of *September*, 1802, caused the defendant to be served with the following notice:

Sir,

I do hereby give you notice, that I shall, on the 29th day of *September* instant, demand the possession to be delivered to me [208] of the lands and premises held by you under and by a lease granted by *John Wright*, Esq., deceased, my late grandfather, and which lease will expire on that day; and I shall at the same time attend on the premises to receive possession of the same lands and premises. Dated the 25th day of *September*, 1802.

Your's &c.

To Mr. *Josiah Smith*. P. WRIGHT.
Wickham-Hall,
Wickham-Bishops, Essex.

That the plaintiff duly attended on the said demised premises according to the terms of last-mentioned notice, on Michaelmas-day 1802, in order to receive, and then demanded the possession. That the defendant insisting on his said last-mentioned lease, refused to quit the possession, and held over, and continued in possession of the said premises until the same were delivered up to the plaintiff under the writ of *Habere facias possessionem*, and agreement hereinafter mentioned.

That an ejectment for the said premises was brought in *Michaelmas* Term, 1802, to which the defendant appeared in *Hilary* Term, 1803, and the ejectment came on to be tried at the Summer Assizes, 1803, where a verdict was found for the plaintiff, on the ground, as expressed by the jury, "That the best rent which could have been fairly obtained for the premises had not been reserved, but that there was no fraud or collusion." Mr. Justice HEATH, before whom the cause was tried, giving [209] the defendant leave to move as he should be advised upon such special finding of the jury. (*a*)

That

(*a*) The ground taken at the trial before Mr. Justice HEATH, upon which he doubted, and gave the defendants leave to move, was, that the clause could

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That in *Michaelmas* Term, 1803, the defendant applied to the Court of Exchequer for a new trial of the ejectment, and obtained a rule *Nisi*, against which cause was shewn on the 3d of *February* last, when the Court having heard the counsel on both sides, refused a new trial. That judgment was signed on the 4th of *February*, when a writ of error upon that judgment was sued out, and allowed, and the allowance thereof served, but which was afterwards abandoned, the parties entering into the following agreement: "That, on the 5th day of *March*, 1804, an agreement was entered into between the parties of that date, by which the defendant agreed to waive all further proceedings on the writ of error brought by him for reversing the judgment obtained in the ejectment cause, and to pay the costs of such ejectment and writ of error when taxed: and a writ of possession was to be executed immediately as to the premises (except certain parts thereof, which the defendant was to retain the possession of for certain times, and upon certain terms stipulated in such agreement), and the plaintiff thereby agreed to pay, or allow, to the defendant the sum of 96*l.* being the increased rent which had been paid to the plaintiff from *Lady-day*, 1796, to *Lady-day*, 1802. But the said agreement [210] was declared to be without prejudice to any action or suit that might be brought against the defendant for recovering double the yearly value of the premises for holding over possession thereof, after the expiration of the said first-mentioned lease, to the time of executing the writ of possession, or to any action or suit for recovery of the *mesne* profits of the premises, and the damages sustained by withholding the possession thereof.

That, under this agreement, the plaintiff, on the 7th day of *March* last, was put into possession by the sheriff, under a writ of *Habere facias possessionem*, of the whole of the premises, except such parts thereof, as were reserved by the agreement for the defendant, and which were delivered up by him to the plaintiff before the commencement of this action at the respective times agreed on for that purpose.

The question for the opinion of the Court is, whether under the before-mentioned facts the plaintiff is entitled to recover. If the Court shall be of opinion that he is, the verdict is to stand; if not, a nonsuit to be entered.

could only apply to cases where there was fraud and collusion between the tenant for life and the lessee to prejudice him in remainder, not where it was fairly let.

The

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The case was this day argued by *Marryat* for the plaintiff, and *Espinasse* for the defendant.

Marryat—This is a case in which a tenant having a regular notice to quit given to him by his landlord, thinks fit to hold over after the expiration of such notice, though the notice was regular, and it determined with the year; who puts his landlord to the expense of an ejectment, and, in fact, to every expense that could be incurred. It requires but little attention to the title of the act, or to the enacting part of it, to see that this case comes clearly within it. The act certainly applies to [211] every case of a wilful holding over by the tenant, after he has had due notice to quit, and the only point in this case is, whether this was a wilful holding over or not.

The statute was made for the benefit of landlords, and intended to give them an additional security. The title is, An act for the effectual preventing of frauds committed by tenants; and in the preamble it is, for securing the lessors and landowners their just rights; and it then enacts, "That in case any tenant or tenants, for any term of lives or years, or other person, who are or shall come into possession of any land, tenements, or hereditaments, by, from, or under, or by collusion with such tenant or tenants, shall wilfully hold over any lands, tenements, or hereditaments, after the determination of such term or terms, and after demand made, and notice in writing given for delivering possession, &c. The landlord may recover the double value of the premises, in an action of debt.

To bring the case within the statute, the term of the tenant must be at an end, his interest determined, and a demand of the possession have been made by the landlord. In this case the plaintiff had a judgment in ejectment to recover from the time of the expiration of the notice to quit. A demand was at the trial proved to have been made. He did not quit accordingly, but wilfully kept the possession from his landlord, and he is, therefore, within the words of the act.

The books are very barren on the subject of this action. In *Wilkinson* v. *Colley*, 5 *Burr.* 2694, it is said that this is a remedial law, and all the statutes must be considered as made *in pari materia*. By the statute 11 *Geo.* 2. *c.* 19. if the tenant gives notice to quit and does not, he is liable for double rent; the reason is the same, that wherever the tenant holds over, after the possession lawfully required by his landlord, he should be liable to the double value. [212]

Lord

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Lord C. B. MACDONALD—Do you mean to contend, that in every case of a holding over the tenant is liable to double value; or do you apply your argument to this particular case?

Marryat—I mean to contend that he is liable in all cases; —what aditional security has the act given unless it so applies?

A man may become a trespasser and be deemed to have committed a wilful trespass even when he endeavoured to avoid it. In the case of *Reynolds* v. *Edwards*, 6th Term Rep. 11. when the defendant had notice not to come on the plaintiff's lands, and it was proved, that he had endeavoured to avoid doing so, and to inform himself of the boundaries of the plaintiff's land, yet having ignorantly come on them, he was held to be a wilful trespasser.

Espinasse, for the defendant—This is a case arising out of an ejectment brought by the reversioner, to avoid a lease made by the tenant for life, who had a power to make leases under certain terms and restrictions. The lease under which the defendant held, not having expired by lapse of time; relying on the validity of that lease, he defended that ejectment, but without success, and it is now attempted to subject him to the penalty of double the value of the land for having contested his [213] right to it by law. It is singular, that this is the first action of the sort, which has ever been tried upon this act of parliament, at least we have no report of any such, though the act upon which it is founded passed in the 4th year of *Geo.* 2. and it is no unconvincing argument that the legislature never contemplated a case of this description: that those who lived at the time when it passed, and who knew the evils against which it was meant to guard, never thought of applying it to such a case as this: they were content to bring an action of trespass for the *mesne* profits, the usual and ordinary remedy in those cases, and to recover in that form of action the value of the property which the tenant had withheld. If the construction contended for by the plaintiff is the true one, the word wilful may be totally blotted out of the statute; for if the mere act of holding over the possession, whether under a claim of right or not, is to subject the tenant to the double value, a holding over and a *wilful* holding over are one and the same thing; and that word upon which the whole of the case is admitted to turn, is an useless and inoperative one.

But no such inconsistency is imputable to the legislature. The term *wilful*, taken in its common as well as legal signification,

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Warren against Sarrat.

tion, is of perfectly definite meaning. Where we say a matter is wilfully done, the mind accompanies the act; and if the act is wrong, it is meant that it carries with it an imputation of blame: the will must accompany the act; it must not only be wrong, but be known to be so when it is committed; that cannot be wrong which is not known to be so at the time, and when it is by matter subsequently arising by the determination of law till then doubtful, that it is ascertained to be wrong or not. [214]

When this ejectment was brought, it may be asked, did the defendant verily and conscientiously believe that he had a title to the possession of the lands? Or did he not? He certainly did believe he had title, for he had a subsisting lease; and the landlord derives title, and seeks to recover in the present action under a deed in his own possession, and locked up in his own desk, of which his tenant could have no knowledge whatever. With such lease in his possession, and ignorant of the rights and power of his landlord, he, for that reason, defended his possession; can it be said, that the law was so clear, that he was wantonly opposing the legal title of his landlord? The Court will see that no defence could be made from a more firm conviction of its rectitude; for the law of the case was unsettled; the Learned Judge (Mr. Justice HEATH) who tried it, doubted of the law, and the reserved point shewed his doubts on the subject: under such circumstances the defendant could not be deemed to be wilfully and contumaciously holding over the possession, when he was so circumstanced as to be placed in this dilemma, that he was either to give up property to which he might eventually be found legally entitled, or in case he unsuccessfully defended his property, he was to be subjected to the penalty of double the value of the lands.

Vid. ante fol. 209, et in note.

In legal acceptation, the term *wilful* is perfectly understood; all the determinations upon it refer to the *quo animo* the thing was done, and important legal distinctions arise on it. In the case of *Savignac* v. *Roome*, 6 *Term Rep.* 125, where the plaintiff declared in case, and stated in his declaration, that the defendant's servant wilfully drove his carriage against his chaise, it was held, that the word *wilful* varied the nature of the action, which should have been trespass *vi et armis*, and not case. By Statute 8 & 9 W. III. chap. 11, in action of trespass *vi et armis*, where the trespass is proved to be wilful and malicious, full costs are given, though the damages are under forty shillings. What is the test of a wilful trespass? That the party [215]

1805. party has had notice, and that he knowingly commits the trespass. To apply the law under that statute to the present, the words of the present act are, "Who shall wilfully hold over after the determination of their estate." Can a man be said wilfully to hold over after the determination of his estate, before he knows whether that estate is legally determined or not? And did the defendant here know that his estate was determined by the notice, until after this Court had decided that it was so determined, by the judgment they pronounced upon a doubtful point of law? To subject the party to the effect of a wilful act, it must be wilful at the time when it was done; there could be no wilful holding over wrongfully while the right was doubtful in point of law.

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No case is certainly to be found in the books directly applying to the point in question; but it is certainly understood, that a case of this sort once occurred before Lord MANSFIELD, [216] in which there had been a treaty for a further term between the landlord and the tenant, but which afterwards went off, the tenant having held over during the treaty, and the landlord having brought an action for the double value under this act of Parliament, Lord MANSFIELD held the action not to be maintainable. (a)

Lord Chief Baron MACDONALD delivered the opinion of the Court, and after stating the case, said, The question, therefore, is, Whether the action under these circumstances is maintainable? The title of the act is to prevent frauds committed by tenants, but the act could never be meant to apply to a case where no fraud was intended, and where the resistance to the possession was under a fair claim of right.

The true construction of the act appears to be, That where there is clear contumacy in the tenant, he shall be within the penalty of the act; for if there is any doubt; if he had any fair ground of defence, and that defence was *bonâ fide* taken, it would be a hard construction to subject him to a *penalty*, for so it is called in the act, for a fair assertion of his title.

Was there any contumacy here, or any fraud in the defence? The tenant had a lease, though it turned out eventually to be a bad one; independent of the reserved rent, he was bound to provide a dinner for the Bishop and his suite, which was not defined in point of expense, and was an addition to the reserved rent; besides which, the tenant was bound to repair;

(a) I was informed by Mr. Serjt. *Lens* of this case, but he had no note of it.

though

though the reserved rent might, therefore, be less than the value, there were additions to it of some importance, which might warrant him in relying on the validity of his lease. 1805. WRIGHT *against* FAITH.

It is a strong circumstance as applying to the action itself, that no authority is produced by the plaintiff's counsel in support of the action. The usual course has always been by an action of trespass for the *mesne* profits, and there seems to be no reason for substituting this action for it, as in trespass for the *mesne* profits the landlord may recover the full value of the land.

As, therefore, there was no contumacy in this case, nor any fraud on the part of the tenant, but a fair holding over under a claim of title, and no authority has been offered to us in support of it, we are all of opinion that the action is not maintainable, and that the Postea must be delivered to the defendant.

SPRING LENT ASSIZES, 1805.

The KING *against* DAVEY and Another.

THIS was an indictment against the defendants for a nuisance.

What facts are evidence in answer to an indictment for a nuisance.

The nuisance charged in the indictment was, that the defendant erected, and caused and procured to be erected, certain furnaces and ovens for the burning of coke, whereby great quantities of smoke was thrown out and vapour raised *ad commune nocumentum* of the inhabitants.

The prosecutors proved, that the ovens did throw out great quantities of smoke, the sulphureous smell of which was very offensive to the inhabitants of the adjoining houses; that the furniture was spoiled; and that flakes of fire often came from the flue of the furnace, which might have been attended with danger. It, however, appeared, that the houses were all inhabited,

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1805. habited, and, in fact, had not been diminished in point of value, or were less sought after by tenants.

The KING against DAVEY.

HEATH, J., in summing up, observed to the Jury, that to constitute a nuisance it must appear satisfactorily to them that the grievance was either destructive to the general health of the inhabitants, or rendered their dwellings uncomfortable or untenantable. That all the witnesses called appeared to be in health, and not to have suffered from the effect of the smoke. There was no noxious composition, as arsenic, or any matter from which the vapour might be produced, so as to endanger the health of the inhabitants; nor had any medical person been called to prove any deleterious quality in it. It had been stated by one witness, that his wife's health had suffered, but there was no evidence to shew that her illness proceeded from the smoke; she might have been ill from other causes, and the jury were not to consider the delicate health of any individual as constituting a public nuisance, as some persons could not enjoy their healths in the neighbourhood of a city. With respect to the injury to the houses, the smoke caused a sulphu-
[219] reous smell only; it might be unpleasant, and make people cough, but it appeared in evidence, that it was most offensive in the open air, and when the windows were shut, did not affect the houses: then, as to the flashes of fire, they appeared to extend but a little way; this was not sufficient, and should seem rather to be the object of an action on the case. To make this nuisance indictable, it should appear to be more extensive, so much so, as to be generally dangerous.

Defendant was acquitted.

Best, Serjt. and *Marryat* for the plaintiff.

Garrow and *Andrews* for the defendant.

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Rex *against* Skinner.

THIS was an indictment against the defendant, Alderman *Skinner*, for not repairing seventy-five feet of a ditch bounding a certain part of the highway leading from *Mitcham* to *Ewell*.

If there has been an encroachment on the highway, and the person removes it, and repairs that part of the highway which was injured by the encroachment once, and then leaves it to the trustees or parish to repair in future, he shall not be liable in future. But if the proprietor of the adjoining land has for any length of time repaired, it is evidence of his liability, unless he gives positive evidence of encroachment.

It appeared in evidence, that this part of the road had formerly been a washway, bounded on one side by the land occupied by, and belonging to the defendant. There had been an archway from the road into the premises of defendant, which had formerly belonged to a Mr. *Barlow*.

The road had been raised six feet, and the washway wharfed on the side up to the highway.

Mr. *Barlow* wishing to change the entrance into the premises, took the archway away, and made *another as an entrance into another part of the premises. Upon taking away the archway, Mr. *Barlow* wharfed up the part adjoining to the road, being the extent of the old archway that had been taken away twenty-five years before; and Mr. *Barlow* had at different times repaired it, when it had become out of repair.

The above facts were proved by the prosecutors. The defence was, that the old archway was an encroachment, that being so, the party who had made it was liable to keep it in repair, while it so continued; but that when it was removed, if the party reinstated the ditch adjoining the road once, and left it in a perfect state of repair, that it was sufficient: and for that purpose cited *Rex* v. *Stoughton*, 1 *Saund.* 160, and *ex parte Armitage*, *Ambler* Reps. they then contended, that Mr. *Barlow* having, upon taking away the archway, wharfed up the ditch to the road side, and so perfectly repaired the ditch, that the *onus* of future repair could not be thrown on the defendant, who had succeeded him.

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Heath, J. This indictment consists of two counts; the first charges the defendant to be liable to the repair by reason of the tenure of certain lands abutting on this ditch, which is the boundary of the highway; and the second charges his liability by reason of his occupation of the lands. The defendant says, there was an archway leading from the road into

1805.

REX *against* SKINNER.

his premises, which was an encroachment, but which having been removed by his predecessor, and the embankment being perfectly made, no liability attaches on him to repair; but I see nothing to warrant us in saying, that this *was an encroachment. No evidence is given of the time when it was erected; if that had been done, it might then have appeared that it was an encroachment, and the law would have been as cited by the counsel; but here all the evidence speak of the old arch and of the water passing under, and speak of it as existing out of all memory. But usage is in questions of this sort always to be attended to; if Mr. *Barlow* had contented himself with repairing it once, and then left it to the trustees of the road, or the parishioners, to have afterwards repaired it, it would have the appearance of an encroachment, but he for twenty-five years, at different times, repaired it; that shews his sense of his own liability, and is consistent with the case of the prosecutors.

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The jury found the defendant guilty.

Shepherd, Serjt. and *Morris* for the prosecutor.

Garrow, the Common Serjeant *Knowlys*, and *Marryat*, for the defendant.

DOE ex dem. Churchwardens of Croydon, *against* COOK.

An examined copy from the books of the Manor, that certain pits have been demised, is evidence without production of the books themselves to shew that they were demisable by custom.

THIS was an ejectment brought under an inclosure act to recover the possession of certain sand-pits on *Shirley Common*, in the parish of *Croydon*. The common had been divided under an inclosure act, and the pits were claimed by the plaintiff under an allotment.

*The defendant relied that the pits were distinct from the soil, and had been leased by the Lord of the Manor, they being copyhold.

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To prove the fact, the defendant's counsel produced an examined copy from the books of the Lord of the Manor, to this purpose; "A. D. 1774, at a view of *Frank Pledge, &c.* The homage present that *Thomas Parry*, Esq., held all the piece of waste land on *Shirley Common*, in the parish of *Croydon*, *together with all the sand-pits and gravel-pits then made, or to be made;*"

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CROYDON. Churchwardens of, *against* COOK.

made;" they then offered in further evidence similar proof of other subsequent demises.

Best, Serjt. objected that this evidence was inadmissible. That the premises appeared to be copyhold, and it should appear that they were demisable by custom; that could only appear by entries from the books themselves, that the premises had been so demised, and that this could not be established by an entry of a demise no farther back than the year 1774. To establish this, therefore, the books themselves should be produced, in order to refer to antecedent entries, by which the custom to demise could be established.

HEATH, J. said he would receive them in evidence, and they were admitted.

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READ *against* BORRADAILE and Others.

THIS was an action of trespass against the defendant, the late sheriff of *Surry*, and others, for breaking and entering the plaintiff's house, seizing and taking his goods stated in the declaration.

Defendant pleads a judgment by reason of the non-performance of several promises and undertakings. The Record, when produced, was a judgment on one count only, on a bill of exchange referred to the prothonotary, and a *remittitur damna* as to all the other counts. It is a variance, and does not sustain the plea.

The defendant pleaded, first, Not Guilty; secondly, That in Trinity Term, 44 *Geo. 3.* one *William Henry Surman*, by the consideration and judgment of the Court, did recover against one *Joseph Mombrun* the sum of 30*l.* as well by reason of the non-performance of several promises and undertakings of the said *Joseph Mombrun*, as for his costs and charges by him in that suit expended, of which the said *Joseph Mombrun* was convicted, as appears by the record, &c. It then set out the writ of *fi. fa.* issued on that judgment, and justified the entry under that writ.

Replication de injuria sua propria.

The plaintiff proved the taking of the goods and their value, and that they belonged to the plaintiff, and not to *Joseph Mombrun* the defendant in that action.

The defendants' counsel in proof of their plea produced an office copy of the Judgment. The action had been brought against *Mombrun*, as the acceptor of a bill of exchange, on which there had been a judgment by default, and it had been referred to the prothonotary, who had taxed principal, interest, and

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READ *against* BORRADAILE.

and costs, upon which final judgment had been signed. The office copy of judgment set out the declaration and judgment by *nil dicit*, wherefore the said *William Henry* ought to recover against the said *Joseph* his damages by occasion of the premises, and hereupon the said *William Henry*, here in Court, remits to the said *Joseph* all such damages as he the said *William Henry* hath sustained by reason of the premises in 2d, 3d, 4th, and last counts of the declaration mentioned, therefore the said *Joseph* is free from those damages; and thereupon the said *William Henry* prays judgment and his damages by occasion of the premises, in the first count of the declaration mentioned: and because it appears that the said *William Henry* hath sustained damages by reason of the premises in the first count of the declaration mentioned, to the amount of 13*l.* besides his costs and charges; therefore it is considered, that the said *William Henry* recover against the said *Joseph* his damages by occasion of the premises in the said first count of the said declaration mentioned, to be adjudged to him, &c.

It was objected that this evidence did not support the plea. That the plea set out, that the plaintiff in the action of *Surman* v. *Mombrun*, had judgment recovered against the defendant for the sum of 30*l.* by reason of the non-performance of the several promises and undertakings in the declaration mentioned; whereas the judgment was not a judgment to recover by reason of the non-performance of several promises and undertakings, but of one only, namely, that laid in the first count.

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HEATH J. ruled it to be a variance, and that it did not sustain the plea,

Verdict for the defendant.

Garrow and *Lawes* for the plaintiff.

Best, Serjt. and *Comyn* for the defendant.

END OF CASES ON THE CIRCUIT.

CASES

1805.

ARGUED AND RULED

AT

NISI PRIUS

IN

EASTER TERM, 45 GEORGE III.

LAST SITTING IN TERM.

HULLMAN *against* BENNETT.

THIS was an action on the case by the plaintiff as the owner of certain goods shipped on board a vessel called the *Triton*, against the defendant, as owner of a certain other vessel.

Declaration in case, for negligently steering, managing, and directing a ship by which another ship was injured, is not supported by evidence, shewing that it proceeded from unskilfully stowing the anchor, so that it caught hold of the other vessel, and broke into her side.

The declaration stated the grievance thus, That the defendant, by his then servant, so negligently, carelessly, and unskilfully steered and directed the said vessel of the defendant, that by and through such negligence, unskilfulness of steering, managing, and directing the said vessel of the defendant, she violently drove and ran foul *of the said ship called the *Triton*, by which the injury was occasioned.

It appeared in evidence, that the plaintiff and defendant's vessels were sailing in different directions; that the defendant's vessel carried her anchor on her side, and in great part under water, and that the anchor had, in fact, taken the *Triton*, and broke

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broke into her side, by which the goods had been damaged, so that, in fact, the injury was caused by the unskilful and improper mode of carrying her anchor.

The *Solicitor-General*, upon this evidence, objected, that the injury proved did not correspond with the declaration: that the injury was not occasioned, as laid in the declaration, by any act of steering, directing, or managing the vessel, but from her improperly carrying her anchor, and the evidence, therefore, did notsupport the declaration.

It was answered by *Erskine*, that the suffering the anchor to remain in the state it was when the injury happened, was a neglect of the master and those connected in the navigating the ship, inasmuch as it was their duty to keep her in proper trim, and her anchor properly stowed. So that, in fact, the injury had proceeded from the negligence of the captain in improperly steering and navigating the vessel.

Lord ELLENBOROUGH said, that the evidence must correspond with the declaration, and he was of opinion that the cause to which the damage laid in the declaration was ascribed, was not the true one, nor did the injury arise from the negligent or careless steering, or directing the vessel, but from another cause, namely, the improper stowing of the anchor, and though the plaintiff might have laid the grievance in his declaration so as to bring it within the actual cause of the injury, he thought he had not done it here.

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Verdict for the defendant.

Erskine, *Garrow*, and *Taddy*, for the plaintiff.

Solicitor-General, *Park*, and *Lawes*, for the defendant.

HULLMAN *against* BENNETT.

Mr. *Erskine* moved for a new trial on the ground of misdirection in the Judge, but the Court refused the rule.

SITTINGS AFTER TERM.

KENDRAY *against* HODGSON, Gent. one, &c,

May 31.

THIS was an action of trover, to recover four bills of exchange.

The circumstances of the case were these:—A commission of bankrupt had issued against the plaintiff; the defendant was concerned for several bill-holders, and sued out the commission. After it had been proceeded in, the parties came to an arrangement by which it was agreed that 298*l.* worth of goods which had been taken under the commission, and which were, in fact, the property of the bankrupt's father, should be given up to the assignees, and there should be also given a bill for *300*l.* in consideration of which the defendant, Mr. *Hodgson*, entered into an agreement, by which it was agreed, that on payment of the money, the bills in question should be given up. A bill was accordingly given, and afterwards paid; Mr. *Hodgson* was then called upon to deliver up the bills, which not being complied with, this action was brought.

An attorney who signs an instrument agreeing to give up certain bills of exchange, on certain things being done, is personally liable, unless he enters into the agreement as the attorney or agent, and it is so specified on the instrument.

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A paper was produced in which the bills were scheduled.

The *Solicitor-General* objected, this action could not be sustained; he relied that the character in which the defendant had entered into the agreement was that of an agent, or as attorney for others, who were, in fact, the creditors as bill-holders, not on his own account. That he had a power to bind his principals, and, in fact, had done so, to which principals the plaintiff should have recourse: exclusive of which, there was no evidence of the defendant being now in possession of the bills; so that he could give them up.

The plaintiff relied on *Perkins* v. *Smith*, 1 *Wils.* 328.

Lord ELLENBOROUGH said, the question was, Whether the defendant entered into the agreement to deliver bills as an attorney, or in his own personal capacity. There was no reason why an attorney might not so subject himself; even then it did not appear who was to be sued, if *Hodgson* the defendant was not.

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KENDRAY *against* HODGSON.

not. By the schedule it seemed that the bills were in the hands of *Hodgson*, so that they then could be given up; and, in fact, from the representation of the witness, he had entered into a personal engagement. If he entered into the engagement as an
[230] agent or attorney, he should have so represented himself on the instrument.

It afterwards appeared, that he had signed the schedule as the attorney for the bill-holders, and not on his own account, upon which his Lordship said, it altered the case, and the action could not be supported.

Erskine, *Topping*, and *Raine*, for the plaintiff.

Solicitor-General, *Garrow*, and *Marryat*, for the defendant.

REX *against* BUDD.

THIS was an information filed by leave of the Court against the defendant for a libel on Lord *Saint Vincent*, charging him with divers acts of misconduct while first Lord of the Admiralty, in a pamphlet published by the defendant.

The libel charged, "That at the time of the publication, while Lord *Saint Vincent* was and continued first Lord of the Admiralty," &c. the prosecutor put in the patent appointing Lord *Saint Vincent* First Lord of the Admiralty in order to prove that averment, that at the time of publishing the libel he was so.

Dallas, of counsel for the defendant, objected, that the proof of the noble Lord's appointment was not sufficient, without shewing its continuance down to the time of the publication, the
[231] averment being that the libel was published "while he was first Lord," &c.

Lord ELLENBOROUGH said, that it was sufficient to prove the appointment, that it was evidence to prove the commencement of a thing which was alleged, and that its determination must be proved by the other party, if they wished to avail themselves of it.

The defendant was found guilty.

Solicitor-General, *Garrow*, *Jarvis*, and *Dampier*, for the prosecution.

Dallas and *Talbot* for the defendant.

REX *against* CASSANO.

June 5.

In a criminal information, the information stated that an order had been made to land goods at the quay or wharf appointed by law. That averment is not supported by proving an order to land them at the king's warehouses, though it stands on the wharf or quay.

THIS was an information filed by the Attorney-General against the defendant, who was a bookseller living in *Pall Mall* for a misdemeanor, in attempting to bribe an officer of the customs, to pass some books which had been imported from *Holland* on account of the defendant.

The mode of charging the offence in the information was, "that the defendant offered a bribe to one *J. P.* then being an officer of the customs, to let the goods be conveyed to another place, *than the quay or wharf appointed for the landing of them*, according to the form of the statute in such case made and provided," and averred that an order had been made to land them at the quay or wharf appointed for the landing such goods.

*By the statute 12th of *Charles* the 2d, goods are to be landed at a wharf or quay as there directed.

The taking of the goods from on board the ship, and putting them into a cart, was proved; but the order from the officer for the delivery of the goods was proved to be to deliver them *at the King's warehouse*. It was then given in evidence, that the King's warehouses stood on the quay, that the goods were landed at the quay, or wharf, after which they were carried across, and then deposited in the King's warehouses.

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Upon this evidence, it was objected that the evidence varied from the information. That the information stated, that the order given by the officer of the customs for the delivery was, *at the wharf or quay;* whereas the order produced was for the landing of the goods at the King's warehouses. It was answered by the *Solicitor-General*, that the averment was "at the quay or wharf appointed for the landing thereof according to the form of the statute," and the statute 12 *Cha.* 2. directs, that they shall only be landed at a quay or wharf directed by law: that the King's warehouse was on the wharf or quay, so that, in fact, it was but one delivery. The order, therefore, to deliver at the King's warehouse was virtually an order to deliver at the wharf or quay.

Lord ELLENBOROUGH. It is the duty of the officer to point out in the order, specifically, the quay or wharf at which the goods

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REX *against* CASSANO.

goods are to be delivered. The averment is, "Delivered at a quay or wharf appointed for the landing, &c." The King's warehouse *is not a quay or wharf, they are distinct things; the goods are landed at the wharf, and then they must be transported across it, and deposited in the King's warehouse: *non constat* but they might be brought in by land, without being landed at the quay or wharf at all. In a criminal case the prosecutor must not vary in the proof. The averment is, "That the goods were to be delivered at the quay or wharf;" the order produced is, to be delivered at the King's warehouse. It is a variance, and the defendant must be acquitted.

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The *Solicitor-General*, *Erskine*, *Garrow*, and *Dampier*, for the prosecution.

Taunton for the defendant.

June 7.

KIRWAN *against* COCKBURN.

The gazette alone is not evidence of the appointment of an officer to a commission in the army.

THIS was an action of *assumpsit* on a special agreement stated in the declaration, by which the defendant agreed to exchange his commission for a commission of a lieutenant in the 60th regiment then held by the plaintiff, and by which the *defendant undertook that his commission should produce the sum of 550*l.* It then averred, that the exchange had taken place, and that the defendant had been appointed to the plaintiff's commission in the 60th regiment, but the defendant's commission had sold for 400*l.* only, and the action was brought to recover the difference in price.

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To prove the appointment of the defendant to the plaintiff's commission in the 60th regiment a clerk of Mr. *Bownas*, the army agent, was called. He produced *The London Gazette*. He was asked if he found there the name of the defendant gazetted for a lieutenancy in the 60th regiment in the room of the plaintiff.

Lord ELLENBOROUGH asked if they meant to prove the appointment of the defendant by that evidence only.

Garrow, for the defendant, said, that officers in the army received a commission signed by the king, which was the best evidence. That there had been no notice to produce the defendant's commission, upon the non-production of which the gazette

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KIRWAN *against* COCKBURN.

zette might be evidence; that the mere production of the gazette could not be evidence, as it was frequent in the gazette to announce that a commission mentioned in a former gazette had not taken place.

It was answered by the plaintiff's counsel, that they had no other evidence, but they relied that the gazette was a public paper, and admitted as evidence of all public appointment; that, in fact, the usage was never to gazette an officer for a commission until the money was actually paid; that having shewn his appointment by the gazette, the defendant should shew that it had been recalled.

Lord ELLENBOROUGH said, that the gazette was of itself clearly not sufficient evidence. That the commission itself was the best evidence, which the defendant should have had notice to produce, and on not producing it the gazette might be admitted. He, therefore, nonsuited the plaintiff.

Erskine and *Const* for the plaintiff. [235]

Garrow for the defendant.

WHARAM *against* ROUTLEDGE.

June 7.

THIS was an action of trespass for taking the plaintiff's goods.

If a trader ceases to manufacture, but still continues to solicit orders and to execute them, and holds himself out to the world as capable of executing them, he is an object of the bankrupt laws.

The defendant was the assignee under a commission of bankruptcy which had issued against the plaintiff, and the taking of the goods in question was under the commission.

The plaintiff contested the validity of the commission on the ground that the petitioning creditor's debt accrued after the plaintiff had ceased to be a trader, so that it could not support the commission.

He proved accordingly, that in *November*, 1802, he had ceased to manufacture the articles in which he had before dealt, which were patent stirrups, and the person employed to manufacture them produced his book of work done which charged the plaintiff with work done up to that time, but not afterwards.

The defendant's counsel called for that book.

It

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WHARAM *against* ROUTLEDGE.

If the opposite party calls for the other's book, he has not the option to use them or not, he thereby makes them evidence.

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It was answered, that they should have the book, provided it was then to be received in evidence.

The defendant's counsel required to see it first.

Lord ELLENBOROUGH. You cannot ask for a book of the opposite party, and be determined upon the inspection of it, whether you will use it or *not. If you call for it, you make it evidence for the other side, if they think fit to use it.

The defendant's counsel proved that subsequent to *Nov.* 1802, the plaintiff had written letters to different persons on the subject of furnishing them with stirrups; and a witness proved the packing up of a hamper of stirrups, which was sent from his house, but the witness did not know to whom, nor was there, in fact, any specific sale proved of any thing subsequent to *November*, 1802.

Lord ELLENBOROUGH. There is a great difference between a man leaving trade, and trade leaving him. If a man has carried on a manufactory, his ceasing actually to work it does not for that reason make him cease to be an object of the bankrupt laws, if he continues to solicit orders, and holds himself out to the world as capable of executing orders in the course of the trade; if he does so, he still continues liable to be made a bankrupt.

The Jury found for the defendant.

Erskine and *Lawes* for the plaintiff.

Garrow and *Park* for the defendant.

IN THE COMMON PLEAS. 1805.

SITTINGS AFTER TERM.

TUCK and Another, Executors of CARTER, *against* RUGGLES, Esquire.

July 13.

A single magistrate is not liable to pay for the expenses incurred in preparing plans for a county gaol advertised for by the sessions of which he was one.

THIS was an action of *assumpsit* for work and labour done by the testator as an architect.

In 1793, the jury presented the gaol of the liberty of *Bury St. Edmund's* in *Suffolk*, as being ruinous.

In *February*, 1794, the Magistrates, at their Sessions, entered into a resolution to rebuild the said gaol, and that an advertisement should be inserted in the newspaper for plans or estimates to be adopted for the gaol about to be erected.

A committee of the justices acting for the division was appointed, one of whom was the defendant *Ruggles*. *Carter*, the testator, in his life-time, was an architect, and had with others sent in his plans and estimates, and his were adopted by the committee. There was no time fixed for the commencement of the work, and it was afterwards abandoned, and this action was brought to recover a sum of 500*l.* for the plans and estimates which had been given in and approved of.

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For the defendant it was contended, that the action could not be supported, that the action was against the defendant acting as a magistrate in sessions, for an act done as one of the magistrates acting for the division. The case of *Macbeath* v. *Haldimand*, 1 *Term Reports*, was cited to shew that a man acting under the authority of government, and not on his own account, was not liable, and it was urged, that the defendant was acting here in the same character.

The statute 24th *Geo.* 3. *c.* 54. was cited respecting the building of gaols, and a power is there given to provide for the expenses. That the defendant here was, therefore, acting only under the act, and as a member of the committee.

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TUCK *against* RUGGLES.

Vide *Rex* v. *Glamorgan*, 5 *Term Rep.* 279.

MANSFIELD, C. J. ruled, that the action was not maintainable, that all that had been done, was as a member of the quarter sessions: that a single magistrate could not be liable, as he might be ruined by such a charge. It was not the act of the defendant in his individual capacity, or as a single magistrate, but the joint act of the sessions.

Nonsuit.

Cockell, Serjt. and *Comyn* for the plaintiff.

Shepherd and *Best* Serjts. for the defendant.

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CLARK *against* MANSTONE.

A declaration for not delivering soil *or* breeze is not supported by proving an agreement to deliver soil only, soil and breeze being different things.

THIS was a special action on the case. The declaration stated, that in consideration that the plaintiff had purchased, and the defendant had sold a large quantity, to wit, thirty tons of soil or breeze at, and for the price, or sum of seven shillings *per* ton, the defendant undertook to deliver the same when required, and then assigned a breach in the non-delivery.

The plaintiff proved the agreement for the purchase of the quantity of soil, and at the price stated in the declaration, which he described to be the dust or small particles of ashes, and which was used by brick-makers. Being asked what was meant by breeze, he described it as a part also of ashes, but which contained cinders which would burn in the brick-kiln, and was also used in hot-houses, so that, in fact, it contained the finer particles of the ashes, which was denominated soil, with the addition of cinders.

Lens, Serjt. objected, that there was a variance. The contract stated was on the sale of soil or breeze, that when words are so coupled they must be synonymous; he instanced the case of a messuage or tenement, but that here it being proved that soil and breeze were different things, there was a variance clearly.

It was answered, that it was sufficient for the plaintiff to prove enough of his declaration to entitle him to the action. The declaration being in the alternative, and that having proved

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proved a contract to deliver soil, he was entitled to recover for that. 1805.

MANSFIELD, C. J. said, the declaration was on a contract which was not that laid in the declaration, and that the plaintiff should be nonsuited. CLARK *against* MARSTONE.

Shepherd, Serjt. and *Espinasse* for the plaintiff.

Lens, Serjt. for the defendant.

CHAMPION *against* PLUMMER.

Feb. 23.

THIS was a special action on the case against the defendant for breach of a special agreement. The declaration stated, that the plaintiff bought and purchased of the defendant divers, to wit, thirty puncheons of treacle, at 37*s.* to be delivered the 10th of *December*, twenty puncheons to be delivered on the 31st of *October*, at 36*s.* 6*d.* the other ten at 37*s.* on the 10th of *November*, and breach assigned in the non-delivery.

It is not a good note in writing of the sale of goods if the name of both buyer and seller are not used, and *semble* it should be signed by both, or their agents.

To prove the sale, the plaintiff called his clerk. He stated the agreement from his memorandum book in which it had been entered: the entry was thus written:

"Bought of *William Plummer* twenty puncheons of treacle to be delivered by 10th *December*.

Wm. Plummer.

Twenty puncheons of treacle 36*s.* 6*d.*—1 *Nov.* say 37*s.*— 31 *Oct.* *Wm. Plummer.* [241]

and on another leaf - - - a 37*s.*"

This was the evidence offered of the contract. Upon which *Shepherd*, Serjt. of counsel for the defendant, objected, that no contract was legally proved to entitle the plaintiff to recover. That the statute of frauds in cases of executory agreements, such as the present, required that there should be a note in writing of the contract, which should be signed by the contracting parties: that in this case it was signed by the defendant only, and not by the plaintiff, or his agent; the plaintiff was the buyer and his name was not mentioned at all, so that the contract could apply to any person whatever; he could not be compelled to perform his contract for want of a note in writing, and

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CHAMPION *against* PLUMMER.

yet called upon the defendant to perform the contract, so that there was no mutuality whatever.

Best Serjt. for the defendant, contended, that what was required by the statute was a "note or memorandum in writing of the bargain, to be made or signed by the parties to be charged, or by their agents lawfully authorised." That here the defendant, who was the party charged, had signed the note, and had, therefore, satisfied the statute.

MANSFIELD, C. J. said, he was of opinion that the sale was void. That the statute meant to make the obligation reciprocal, and to bind equally both contracting parties; the words of the act were not *party* to be charged, but the *parties*, in the plural number; meaning that each should be liable on his default. This note did not specify any buyer; it might apply to the plaintiff, or to any one else.

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The plaintiff was nonsuited.

Best, Serjt. and *Marryat* for the plaintiff.

Shepherd, Serjt. for the defendant.

Vide *Jones* v. *Ashburnham*, 4 *East*. 455.

END OF EASTER TERM, 45 GEO. III.

CASES

1805.

ARGUED AND RULED

AT

NISI PRIUS

IN

TRINITY TERM, 45 GEORGE III.

IN

KING'S BENCH.

AT GUILDHALL.

SITTING DAY AFTER TERM.

PENN *against* SCHOLEY and DOMVILL, Sheriffs of London.

THIS was an action against the defendants for a false return of *nulla bona*, to a writ of *fieri facias* issued against a person of the name of *Frost*.

If an execution is contested as fraudulent, on the ground that the defendant in that execution had but a short time previous issued an execution against the then plaintiff on an old warrant of attorney, in which he had sworn that the then plaintiff was indebted to him, the affidavit so made is evidence, after proof of the issuing of an execution upon a judgment signed on that affidavit.

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The sheriffs were nominal defendants, being indemnified by the house of *Goodwyn* and *Co.* who had also levied an execution against *Frost*, and had indemnified the sheriffs for the return they made.

The question turned upon the fact of whether *Penn* the plaintiff's debt was *bonâ fide* or not, it being admitted, that his execution was first put into *Frost's* house, and of course entitled to priority, if it was well founded.

The defendant's case was, that the execution was fraudulent; in support of that case it was stated, that in *April*, 1803, *Penn*, the plaintiff, was indebted to *Frost* in 200*l.* for which he gave a bond and warrant of attorney: that in 1804, the money not being paid, and *Frost* wishing to enter up judgment on it, which could only be done by motion, on an affidavit of the party swearing that the money was due, *Frost* had employed a Mr. *Webb*, an attorney, to enter up the judgment, and *Frost* made the necessary affidavit, stating the money to be then unpaid. Execution was sued out upon the judgment so signed, but an arrangement then took place, and another warrant of attorney was given. Upon this latter warrant of attorney, in *July* 1804, *Frost* entered up judgment, and issued execution: while the writ was in the sheriffs' hands, *Frost* agreed not to levy under the execution, but to take an acceptance of Mr. *Lushington* for 100*l.* and to give time for the rest.

This transaction being so recent, was relied upon by defendants' counsel, as establishing an existing debt in *July*, and
[215] until that debt was paid, as clearly establishing that it was impossible that *Frost* could be a debtor to *Frost* in the month of *November* following, at which time the warrant of attorney on which *Penn's* present execution was founded was stated to have been given.

The defendant proved the execution at the suit of *Frost* in *July*, and offered in evidence the affidavit sworn by *Frost* for the purpose of entering up judgment on the warrant of attorney; on which that judgment was signed, in which he swore that the sum of 200*l.* secured by the warrant of attorney was then unsatisfied and unpaid.

It was objected that this was *res inter alios acta*, and inadmissible.

Lord ELLENBOROUGH said it was admissible; the defendants' case was, that there was fraud in the judgment set up by the plaintiff, and under which he then claimed, and to prove it

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he had given in evidence on execution sued out by *Frost* against *Penn* in *July*, a short time preceding this execution of *Penn* against *Frost*, as evidence of there being then no debt then due from *Frost* to *Penn*, but that *Penn* was then the debtor. This affidavit was part of that transaction, of the *res gesta* at the time; it was accordingly read in evidence.

The defendant had a verdict.

Garrow, *Lawes*, and *Garney*, for the plaintiff.

Erskine and *Espinasse* for the defendant.

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June 26.

WHEELER, Assignee of BRYAN, *against* ATKINS.

TROVER for bills of exchange the property of the bankrupt.

A witness in the cause had been examined on interrogatories.

The interrogatories were produced in evidence. In one of the interrogatories a letter was referred to. The plaintiff's counsel called for the letter.

It was said by the defendant's counsel that they would not produce it, but would abandon the interrogatory entirely.

This was opposed by the plaintiff's counsel.

Lord ELLENBOROUGH ruled, that they could not do so, abandon an interrogatory in part, but they must abandon the whole; that if the defendant, therefore, wished to use his interrogatories, he must produce the letter referred to.

Erskine, *Park*, and *Richardson*, for the plaintiff.

Solicitor-General, *Garrow*, and *Marryat*, for the defendant

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STEVENS *against* HILL.

When a bill is drawn on an agent and made payable out of a particular fund, and agent says he will pay it when he gets money of the principal, this is binding on him, and if he gets money at any subsequent time is bound to pay the bill.

THIS was an action of *assumpsit*. The first count was against the defendant, as the acceptor of a bill of exchange drawn by Admiral *Smith* on the defendant his agent; the others were the money counts.

The bill had been burnt by accident, and the plaintiff gave parol evidence of it.

The defendant was a navy agent, and the bill was drawn by Admiral *Smith*, in this form: "Out of my half-pay, which will become due the first of *January*, pay to *Stevens* 15*l*."

This was brought to *Hill*, who said he had then no money of Admiral *Smith's* in his hands, but that he would pay it out of the admiral's money when he received it.

Admiral *Smith* was called. He produced an account furnished by *Hill* as his agent, containing an account of monies received at different times on the Admiral's account, and also of the bills drawn by him on *Hill*, on which there was a balance of 41*l*. due to *Hill*.

It was objected by *Garrow*, first, that the plaintiff could not recover on the count on the bill, as it appeared to be not a bill of exchange, it being drawn on a particular fund, and not payable generally, which was necessary to constitute a legal bill of exchange.

[248] This count was abandoned by the *Solicitor-General*, who said, that he should go on the count for money had and received.

To this it was answered, that the engagement of *Hill* was to pay the bill when he had money of Admiral's *Smith's* in his hand, and that it appeared by the account which was produced by Admiral *Smith*, that the Admiral was the debtor of *Hill*, and of course that *Hill* had no funds in his hands, out of which only the bill was to be paid.

Lord ELLENBOROUGH, having taken the paper produced, in which the receipts of money and the entries of bills were put under their respective dates, observed, that though on the general balance a sum of 40*l*. was due to the defendant, yet by referring to dates it would appear that *Hill* after the day the bill was brought to him for acceptance, and after his declaration

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as proved, and before he had been called upon to make any payment, had received money of Admiral *Smith's* more than sufficient to answer this bill. It was, therefore, his duty to have reserved for that bill, and not to have paid other drafts subsequently drawn. He was not, therefore, protected by subsequent payments. His Lordship added, that a similar case of an army agent had occurred before Lord KENYON, in which the agent had promised to pay the draft of a person on him, and having neglected to do so, an action was brought, that he was of counsel for the defendant in that cause, and argued that this promise of the agent was *nudum pactum*, but Lord KENYON over-ruled the objection, and held that it was an appropriation of so much to the use of the holder of the draft, and made him liable on the receipt of any money upon the credit of which it was drawn.

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Verdict for plaintiff on three counts.

Solicitor-General and *Becket* for the plaintiff.

Garrow and *Lawes* for the defendant.

PARKER and RICH *against* HARCOURT.

July 9th

ASSUMPSIT on an Attorney's bill.

The plaintiff proved the regular delivery of his bill, and gave general evidence of employment.

When an attorney has entered into an agreement with a client to conduct all his suits in consideration of the client giving to him exclusively the drawing of his leases, if the client gives part of that business to other attornies, the attorney must either put an end to the agreement, or sue for breach of the agreement, for while it subsists he is bound to the terms of it.

The defence was, that the plaintiff had been employed by the defendant under a written agreement to the following effect, which was produced, and was in these words.

"In consideration of Mr. *Harcourt* having appointed me his solicitor, and of the emolument which I shall receive from preparing his leases, I undertake to conduct such suits as he shall be concerned in, without any charge, except the fees and disbursements actually out of pocket." Signed by Mr. *Parker*, one of the plaintiffs.

Upon this being read, it was contended, that this was an answer to the case, and the money actually expended having been paid, that the plaintiff could not recover for the business done.

Park, in answer, proposed to prove, that the defendant had, during

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during the time that the plaintiff was supposed to have acted under this agreement, employed *other attornies, who had done business for him. This, he contended, put an end to the agreement; but he relied upon a preliminary objection, that this was not binding on the plaintiffs, it having been entered into by one partner only, (Mr. *Parker*), which he contended did not bind the other.

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Lord ELLENBOROUGH said, that it was an agreement entered into by one in the course of the business which was conducted by both, and should be binding.

When collateral things are to be performed by two parties to an agreement, one party cannot set up a breach of his part by the other to entitle him to claim generally independent of the agreement.

Lord ELLENBOROUGH then asked *Park* upon what ground it could be supported that the agreement was void.

He said, that the agreement having been entered into, by which the plaintiff had given up certain legal claims to which he would otherwise have been entitled, in consideration of his receiving certain advantages; that the defendant by not giving him those advantages was guilty of a fraud, and could not avail himself of the agreement, as far as he was to be benefited, when he had not performed that by which the other party were to be so too.

Lord ELLENBOROUGH said he was of opinion, that while the agreement subsisted, nothing could be recovered except the money out of pocket. Each party had distinct and collateral things to perform. If the plaintiffs thought that Mr. *Harcourt* gave part of his business to other attornies, they should have put an end to the agreement by giving notice to the defendant of their intention to do so, but till that was done they were bound to abide by the agreement, or they should have sued for breach of the agreement; for it could not be expected that the defendant could come prepared to meet the charge imputed to him in an action merely for business done.

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Park then suggested, that as great part of the bill was in attending arbitrations, that they could not be called *suits* in the terms of the agreement.

Lord ELLENBOROUGH. That is a suit which any man institutes in the form of a legal proceeding to recover what he claims as a matter of right; an arbitration is such a proceeding, and is a suit which Messrs. *Parker* and *Rich* were bound to conduct under the terms of the agreement.

Conducting an arbitration is to be considered as a suit.

The plaintiffs were nonsuited.

Park and *Wigley* for the plaintiff.

Erskine and *Garrow* for the defendant.

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DUCKHAM *against* WALLIS.

July 15.

ASSUMPSIT by the plaintiff, as the indorsee of a bill of exchange drawn by *Evans*, and by him indorsed to *Hawkes*, who indorsed to the plaintiff.

The bill was dated in the year 1802, the plaintiff proved the hands writing of the several parties, and there rested his case.

*The defence relied on was, that this bill had been indorsed to the plaintiff after it was due; that when it became due it was in the hands of *Evans*, and that it had been settled in account between *Evans* and the defendant, so that *Evans* could maintain no action on it against *Wallis* the defendant, and it was, therefore, concluded, that according to the authority of the case of *Beck* v. *Robley*, 1 *Hen. Black. Rep.* 89, the defendant was let into the same defence against the plaintiff which he could have had against *Evans*, the plaintiff having become possessed of it after it became due.

To establish this case, *Garrow*, for the defendant, called a witness, who stated, that he had seen the bill in *Evans's* possession after it became due. He was then asked as to the account which *Evans* gave of the transaction as between him and *Wallis*, to shew that as between *Evans* and the defendant the bill was discharged and finally settled in account.

This was objected to by the plaintiff's counsel; they contended that what *Evans* had said was not evidence. It was not the best evidence, as *Evans* himself might be called to prove the transaction, and state whether, in fact, the defendant had so settled the bill as had been stated.

It was answered by the defendant's counsel, that the rule of law was, that the defendant might set up the same defence against the plaintiff suing as the indorsee subsequent to *Evans*, which

Where in an action by the indorsee of a bill, the defence is, that the defendant had settled it in account with the holder when due, and that the plaintiff took it after it became due, what was said by the person represented as the holder and indorsee when it became due, is not evidence, he should himself be called.

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which he could against *Evans*, so that what would be evidence against *Evans* should be evidence against the plaintiff, and as there could be no doubt that *Evans's* own *declarations could be evidence against himself, it was equally clear that they should be received as evidence against the plaintiff.

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Lord ELLENBOROUGH said, he thought the evidence inadmissible; though a bill had been indorsed after it became due, if a full and valuable consideration had been paid, he did not know why the holder might not recover on the bill, subject, nevertheless, to the case put, of its being discharged by the defendant; but it would be incumbent on him to prove the consideration paid, and of that the plaintiff should give evidence. That the fact of the bill having been paid when due, and settled in account with the defendant, was easily proved by calling *Evans* himself, or by the evidence of third persons; but what *Evans* had said was not the best evidence, when he himself could be called; it would be making the declarations of a third person's evidence to affect the plaintiff's title when that party was not on the record, and, therefore, could not be received.

The *Solicitor-General* mentioned the case of *Bauerman* v. *Radenius*, the principle of which his Lordship observed applied to this case.

The plaintiff failed in proof of the consideration, and was nonsuited.

Park and *Espinasse* for the plaintiff.

Garrow for the defendant.

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ARDERN *against* ROWNEY.

If a check drawn upon any person is sent by another to know if it is good before he will receive it, and such person says it will be honoured, as he is indebted to the drawer of it, though the check turns out to be void, as being post-dated, the holder may, nevertheless, recover on the ground of the sum due to the drawer of the check being so appropriated.

ASSUMPSIT on a check for 100*l.* money had and received, with the other common money counts.

The plaintiff's counsel opened his case to be, that one *Alder*, who had since become a bankrupt, had applied to the plaintiff to discount a check for 100*l.* drawn by *Alder* upon *Rowney* the defendant: that before the plaintiff would give cash for it, he

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sent his clerk to the defendant, he saw him, and asked him if the draft was a good one? He said that it would be honoured, as he was in *Alder's* debt 200*l.* The clerk then observed, that the check was post-dated, and could not, therefore, be recovered; the defendant said, that that did not signify, it would be of service to the poor man, and that it should be paid.

These facts were proved.

Upon this evidence *Erskine* objected, that the plaintiff could not recover on the count on the check, as it was admitted to be void; and as to the second, he said it was clear, that if this was a mere promise of the defendant, by which he promised the plaintiff, that if the plaintiff would advance 100*l.* on his check to *Alder* he would pay it, it would be decidedly void within the statute of frauds, as being a promise to pay the debt of another without a note in writing, so that it could not be money had and received.

It was admitted that it was void, being post-dated, and of course could not be given in evidence, neither could parol evidence be given of its contents. The evidence, therefore, was nothing more than a parol request to the defendant to advance a sum of 100*l.* to *Alder*, which was, therefore, void. [255]

Lord ELLENBOROUGH. If this had been an agreement to pay the amount of any money which the plaintiff might advance to *Alder*, and no specific sum of money had been mentioned, which was to be so advanced, I should have thought this a case within the statute of frauds, but it appears to me, that this is an appropriation of 100*l.* part of the money which defendant said he owed to *Alder*, amounting to 200*l.* and that the plaintiff may recover.

It was then suggested by *Erskine*, that if it was to be taken that the plaintiff's right to recover was on the ground of the appropriation of the money in the defendant's hands, the plaintiff's right could not go beyond the money actually due by *Rowney* to *Alder*, and that, in fact, his saying there was 200*l.* in his hands was a mistake, and that he should shew it was a a small sum only.

Lord ELLENBOROUGH assented to that, and evidence was produced to shew the real state of the accounts; it was a balance of 80*l.* for which sum the plaintiff had a verdict.

Garrow and *Raine* for the plaintiff.

Erskine for the defendant.

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IN THE COMMON PLEAS.

CHAPMAN *against* PARTRIDGE.

July 25th.

When a person is told by two parties that he is to be the broker, to make a contract between them for the sale of goods, and he, in consequence, reduces it into writing, and sends a sale note of the terms to each party, this is a valid contract within the statute of frauds.

THIS was an action on the case against the defendant for non-performance of a contract for the sale of a quantity of sumach.

The contract as set up by the plaintiff was stated to have been made by a broker of the name of *Aylwin*.

The defendant was executor to his brother, and his widow, Mrs. *Partridge*, was interested and continued in the business.

Aylwin was called. The account he gave of the transaction was, that Mrs. *Partridge* and the plaintiff having been in treaty for the sale of this sumach, they had agreed that the witness should be the broker to manage the sale between them: the sale did not then take place, but some days after *Chapman*, the plaintiff, informed him that he had purchased the sumach, and informed him of the bargain, and desired him to put down the terms. He made an entry in his book as desired by *Chapman*, and he sent a sale note of the terms to Mrs. *Partridge*. She did not return the sale note, but in a conversation with him some days after, she said she was very sorry for what she had done, and that Mr. *Lawrence Partridge* (the defendant) was very angry with her.

[257] *Best*, Serjt. objected, that this was a case within the statute of frauds. Having quoted the words of that statute, he said that the note in writing was to be signed by the parties or their agents; here the parties never met, the note was made by the communication of the plaintiff to the broker, and then the note was made without any authority from the buyer.

It was answered by *Shepherd* and *Bailey*, Serjts. that *Aylwin* was to be taken as the agent of Mrs. *Partridge*. She had told him he was to be the broker before the sale took place. He prepared a contract in writing, which was sent to each party, and not returned, that was an adoption of the agency and was binding.

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MANSFIELD, C. J. The note in writing may be received, it is signed by the broker, and the only question is, if it was signed by the authority of the defendant. It is in evidence, that she had consented that *Aylwin* should act as the broker, that authority might be countermandable; but when he does act as agent to her in making the bargain, and she receives the sale note, she does not refuse it, or send it back, but in two days after expresses her sorrow for having done it. The jury must, therefore, say, if *Aylwin* had any authority from Mrs. *Partridge* to make the contract, or if what passed then was not a recognition of his authority, which would be the same thing as if she had given him directions to make the contract at first.

It was proved, that the defendant refused to perform the contract, and this action was brought to enforce it; but that could [258] not be done if the note of the bargain, as stated by *Aylwin*, was not complete, which depended upon the fact of his then having authority.

Verdict for the plaintiff.

Shepherd and *Bailey*, Serjts. for the plaintiff.

Best, Serjt. for the defendant.

THE END OF TRINITY TERM.

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CASES

ARGUED AND RULED

AT

NISI PRIUS

IN

THE KING'S BENCH,

MICHAELMAS TERM, 46 GEO. III.

SITTINGS AFTER MICHAELMAS TERM.

The KING *against* BRETT.

An averment in an indictment, that at a Sitting at *Nisi Prius* holden after *Michaelmas* Term, on the 29th day of *December* in that year, in the Court of King's Bench, before the Lord Chief Justice of the said Court, an indictment came on to be tried, is not supported by proving a trial at *Nisi Prius* before the Lord Chief Justice, only as that describes a trial at bar.

THIS was an indictment against the defendant for perjury. The perjury assigned in the indictment was, that at the trial of an indictment against one *Thomas Price*, the defendant had sworn, first, that the said *Thomas Price* polled at the election for members of parliament for the county of *Middlesex*,

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at *Brentford*, under the name of *John Wright*, No. 8, *Bell-yard, Gray's Inn-lane;* and, secondly, that a piece of paper which he produced at the trial was the hand-writing of him the said *Henry Brett*, and written by him on the Hustings at *Brentford* at the time; both which matters the present indictment charged to be false.

The case being stated, the indictment against *Price* was produced. The first witness called proved that the trial of *Price* had taken place at the *Sittings* before Lord ELLENBOROUGH, at *Nisi Prius*, after *Michaelmas* Term, 1804. [260]

The *Solicitor-General* then objected, that the evidence given did not support the averment in the present indictment, but totally varied from it. The averment in the present indictment was, "That at the Sitting at *Nisi Prius* holden after *Michaelmas* Term, in the 45th year of the reign of our Sovereign Lord George the Third, on the 29th day of *November* in that year, in the Court of King's Bench, before EDWARD Lord ELLENBOROUGH, then Lord Chief Justice of the said Court. That the trial of the said *Thomas Price* came on to be heard in due form of law, &c." He contended that this averment was not a description of a trial at *Nisi Prius* at the Sittings after Term, but of a trial at Bar. It stated, that the indictment came on to be tried in the Court of King's Bench. This was not a local description of the place where the trial actually took place, but of the Court as a Court constituted as it was with the Judges sitting therein, of whom Lord ELLENBOROUGH was the Lord Chief Justice. That it could not mean the place, for the following words are "before EDWARD Lord ELLENBOROUGH, Lord Chief Justice of the said Court," which clearly meant the Court so constituted, and not a Court of *Nisi Prius* before the Lord Chief Justice alone.

He was followed by *Garrow* and *Abbott* on the same side; who added, that "the language of the indictment should have been, as to the trial having taken place at *Nisi Prius*, that it was tried at *Westminster*, in the Great Hall of Pleas, at *Westminster*," which was the uniform language of the proceedings. [261]

That since the statute of *Nisi Prius*, 18 *Eliz. ch.* 12, the distinction was very clear, for before that statute all trials were at bar: that statute empowered the Chief Justice alone to sit at *Nisi Prius*, but it was in the words of the statute in the Hall called *Westminster Hall*, in *Westminster*, or the place where the Court of Exchequer is commonly kept, in the said county;

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so that a certain degree of locality is given to trials at *Nisi Prius;* that they must be in *Westminster Hall*, or where the Exchequer sat; but the Court of King's Bench might sit in the Court of Chancery, if, for example, the Court in which they were then sitting was under repair. The words, therefore, "came on to be tried in the Court of King's Bench," could not apply to that place or room denominated the King's Bench, as in the case put the trial at *Nisi Prius* would be legal under the statute; as, therefore, a certain locality was annexed to *Nisi Prius* trials, it was always specifically alleged, and was not done here.

It was answered by *Erskine* and *Dampier* for the prosecution, that the day of the trial of the indictment against *Price* being laid on the 29th of *November*, it sufficiently appeared that the trial could not have taken place in Term time, nor have been a trial at Bar, as the Court would take notice that the Term ended on the 28th, and that coupled with the words
[262] "in the Court of King's Bench," these latter words could only mean the place where the sittings were held; but that, at all events, there were the words "to be tried in due form of law," which could only mean that it was tried according to the direction of the statute, and that it would not be presumed that the Lord Chief Justice had sat irregularly.

Lord ELLENBOROUGH said, that in a criminal case he could presume nothing; he had at first some doubt whether he should reserve the point, but upon considering it, he had no doubt as to its being fatal; the Court of King's Bench in its jurisdiction was limited to no locality, its jurisdiction extended all over *England*, and it might sit any where in *England*. The term Lord Chief Justice of that Court meant the Chief Justice of that Court, so exercising that general jurisdiction, not circumscribed or confined to any particular place; but as the Judge sitting at *Nisi Prius* the case was very different. The statute of 18 *Eliz. ch.* 12, pointed out where the sittings at *Nisi Prius* before the Lord Chief Justice can only legally be held, that was in *Westminster Hall*, or in the place where the Exchequer was used to sit; there was, therefore, a locality belonging to trials at *Nisi Prius*, and the language of the precedents referred to shewed it, that the Sittings at *Nisi Prius* before the Lord Chief Justice should be stated to be held in the Great Hall of Pleas, called *Westminster Hall*, at *Westminster;* that was not averred so here, but it was attempted to be cured by saying

saying that the indictment stated "that the former indictment was tried in due form of law." It *could be allowed to give these words such an extensive signification; it would go to make these words cure every defect. It was too wide an interpretation. The indictment had not, therefore, sufficiently alleged the place of trial of the former indictment against *Price*, and that the defendant must be acquitted.

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Erskine, *Dampier*, *Warren*, and *Clifford*, for prisoner.

The *Solicitor-General*, *Garrow*, and *Abbott*, for defendant.

The defendant was acquitted.

SAMMELL *against* WRIGHT.

Dec. 5th.

THE declaration in this case stated, that at the time of committing the grievance, the plaintiff was possessed of a certain chaise, drawn by one horse, then drawing it, and being on the King's highway. That the defendant was the owner and proprietor of four certain horses then hired, and let out by the defendant for hire, and which were then under the care, guidance, and direction of certain servants of the said defendant; and then assigned the grievance, that the said defendant by his said servants so negligently, carelessly, and unskilfully drove the said horses, that the carriage then drawn by the said horses was driven against the chaise of the plaintiff, by which it was overset, and the plaintiff thrown out and his collar-bone broke.

If horses are hired out to draw a private carriage, but are driven by the servant of the person who hires them, he shall be liable for any injury done by them.

The facts of the case were, that the defendant, who was a stable-keeper in Bond-street, had on the day the accident happened hired out to the Marchioness of *Bath* four horses to draw her carriage to *Windsor*. The horses were driven by two postillions who were servants to the defendant and had the care of the horses. The plaintiff was driving quietly through *Brentford*, when the carriage coming at a fast rate after him, the near wheel of the carriage had taken the off wheel of the plaintiff's chaise and overset it; he was thrown out, and his collar-bone was broken.

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Upon opening the defendant's case, *Erskine* contended, that in point of law the defendant was not liable. That, in fact, the carriage was the Marchioness of *Bath's*, the drivers were under her direction and controul, and it could not, therefore, be said

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that they were under the care, guidance, and direction of the defendant's servant, for *pro hac vice* they were hers.

Lord ELLENBOROUGH said, the defendant was liable. The horses were hired out for a particular purpose, but they were still under the care and direction of the defendant's servants.

Verdict for the plaintiff.

Garrow and *Lawes* for the plaintiff.

Erskine and *Marryatt* for the defendant.

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AT GUILDHALL.

Dec. 10.

BROWN *against* M'DERMOT.

Where an indorsee of a bill is discharged by laches, and the holder relies upon a new promise, he must prove a demand on the acceptor. But it is sufficient to demand payment at the usual place of residence of the acceptor, and if it is not then paid, it is sufficient to entitle the party to proceed against the indorser.

ASSUMPSIT by the plaintiff as indorsee of a bill of exchange for 50*l.* against the defendant as the indorser.

The bill was due the 21st of *May*, but by mistake the 21st of *June* was written on it, in consequence of which no demand was made of it from the acceptor, nor any notice given of the nonpayment until a month after the bill was due. This was stated in the opening by the plaintiff's counsel, who admitted the law to be that the party would be discharged for want of notice, but he relied on a subsequent promise to pay the bill, which he contended was a waiver of the objection of want of notice, and revived the defendant's responsibility.

To prove the promise to pay, the plaintiff called a witness, who proved, that in a conversation with the defendant, he said that he knew he was discharged, but that the plaintiff had behaved so well to him in money matters that he should take no advantage of it, but would pay the money.

Park relied that this revived the liability, and entitled the plaintiff to recover without any further evidence.

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Lord ELLENBOROUGH said, it was not of itself sufficient, that it was necessary to prove a demand upon the acceptor, and a refusal by him to pay the money, as the liability of the defendant only arose by reason of his default.

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BROWN *against* M'DERMOT.

The plaintiff's counsel then called a witness who proved that he carried the bill to the house described as the place where *Smithson* the acceptor was described to live, but that there were no orders left, and the bill was not paid; but it appeared that the witness never saw the acceptor.

Garrow for the defendant objected to the evidence, and that the plaintiff should be called, first, on the ground that the promise to pay was not made to the plaintiff the indorsee himself, which he contended to be necessary; and, secondly, that the hand-writing of the acceptor should be proved, and an actual demand on him.

Lord ELLENBOROUGH, in summing up, told the jury, that it was necessary to prove a demand of the bill and nonpayment by him; that if a bill was payable at a certain house, it was sufficient to demand the money there; that had been done here, for it was the duty of the drawer of a bill to leave provision for the payment of it.

Verdict for the plaintiff.

Park and for the plaintiff.

Garrow for the defendant.

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KLINITZ *against* SURRY.

Dec. 12th.

When goods are sold by sample, and the sample delivered is part of the bulk, and the bulk thereby diminished, this is a part delivery within the statute of frauds.

THIS was a special action on the case. The declaration stated, that the plaintiff had sold to the defendant fifty quarters of wheat, which the defendant had refused to receive, for which the action was brought.

The evidence was, that the plaintiff had sent 195 quarters of wheat consigned to his factors *Giles* and *Jennings* for sale. *Jennings* stated, that he sold by sample 50 quarters to the defendant.

The usual mode of selling on the corn exchange he stated to be, that he made an entry in his book of the quantity sold and the price it sold for. He said the defendant, when he made the sale, told him he employed *Kendal* as his ledger to receive the corn, and to whom the sample was delivered. But on his cross-examination, he said he considered himself as agent for the seller only.

1805.

KLINITZ *against* SURRY.

The sample had been delivered to *Kendal* only, and the defence on the merits was, that the bulk did not correspond with the sample.

The counsel for the defendant contended, that this case came within the statute of frauds, and was void, there here being neither a note in writing, or a delivery of any part of the commodity sold, and the case of *Cooper* v. *Ellston*, 7 *Term Rep.* 14. was cited.

[268] It was answered by the plaintiff's counsel, that there was, in fact, a part delivery, the defendant's agent having received a sample of the corn in part, and that the factor was to be considered as the agent for both parties, and the entry in his book was a note in writing sufficient to satisfy the statute.

Lord ELLENBOROUGH. How far the delivery of the sample in this case is a part delivery to satisfy the statute of frauds or not, depends upon the manner in which that sample was taken; if the fifty quarters were standing as a distinct parcel and bulk, and the sample taken from it, if the quantity was thereby diminished so much, and the delivery of the 50 quarters was so much less by this quantity, I think it would be a part delivery, and sufficient within the statute, but it would be otherwise if the delivery of the sample was a collateral thing, a part of another parcel of the same sort of corn.

It therefore became a question whether the fifty quarters which were admitted to be part of the 196 quarters were separated from them, and whether the whole quantity was together, so that the sample was taken from one bulk or the other. Upon this there was contradictory evidence.

As to the second point, the book of the cornfactors *Giles* and *Jennings* was produced; there was an entry of the prices and quantity, but the name of the seller was not in it; upon which Lord ELLENBOROUGH said, he was clearly of opinion, that that was not a note in writing within the statute of frauds.

[269] His Lordship in summing up to the jury, left them first to consider upon the fact of whether the bulk and sample did in fact correspond.

The jury found that it did not; the defendant, therefore, had a verdict.

Erskine and *Holroyd* for the plaintiff.

Garrow and *Gaselee* for the defendant.

1805.

HERON *against* GRANGER.

Dec. 19th.

An agreement respecting the sale of goods need not be stamped, though it contains stipulations concerning the mode of payment and other things.

THIS was an action of *assumpsit* for goods sold and delivered.

Plea of *non-assumpsit.*

The plaintiff was a merchant living in *Belfast* in *Ireland.* Having had antecedent dealings with the defendant when in partnership, he on the 4th day of *March*, 1805, wrote to him to insure a cargo of hams, which on the 2d. he had shipped from *Belfast* to *London.* The defendant did so; the goods were shipped to the order of the shipper, and on the arrival of the vessel in *London*, he took possession of the hams. In fact, the plaintiff had sold them in *Belfast* to a person of the name of *Langley*, and it had never been his intention that the defendant should have intermeddled with them at all. The defendant having so possessed himself of them, they were demanded by *Langley's* agent, and on refusing to deliver them an action of trover was brought. Before the action of trover came on to be tried the plaintiff arrived in *London*, and then an arrangement took place to put an end to the action and further differences, the defendant taking the goods at the invoiced prices, and paying the costs. The parties having met, the terms of the agreement were agreed to be put in the form of a letter addressed by the defendant *Granger* to the plaintiff, of which the following was a copy: it was written at the meeting, and then delivered by the defendant to the plaintiff.

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"Mr. *Thomas Heron.*

London, May 21*st*, 1805.

"SIR,

"In order to put an end to all further disputes respecting the twenty-four casks of hams per *Hibernia*, I will accept of the terms you proposed of taking the whole of them to my own account at 65*s. per* barrel *per cent.* invoice weight, with all faults; and the fifty-five kegs of pigs' tongues at 15*s. per* keg, the freight and landing charges to be deducted, making the net sum as *per* account annexed 876*l.* 18*s.* 11*d.* which sum I engage to pay you for them in the course of a month from the

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HERON *against* GRANGER.

date, in approved bills, not exceeding two months, with my own indorsement on them; as I shall be answerable to you for the payment of such bills as I give you, and I engage to bring no charge of any kind (except the cost of insurance from *Belfast* to *London*), hereafter against you, or Mr. *George Langley* of *Belfast*, for commission, or any loss or charge that have or may be on them, but agree to release and indemnify you and him completely from every thing of the kind; and you engage [271] on your part also to keep me indemnified from any charge or claim Mr. *George Langley* may fetch against me respecting them.

"Yours, &c.

"*John Granger.*"

The plaintiff proved the circumstance, and gave the letter in evidence; it was in the form of a letter and unstamped.

Neither is it necessary to declare on it specially, after the time of payment is

The counsel for the defendant made two objections to the plaintiff's recovering; first, that the letter contained the terms of a special agreement, and should have been specially declared upon; whereas the plaintiff had declared for goods sold and delivered only. The second objection was, that being in terms an agreement, it required a stamp, and could not be received in evidence without one.

It was answered by the plaintiff's counsel, this was an agreement for the sale of goods, wares, and merchandizes; that it, therefore, came within the exception of the stamp.

Then as to the necessity of a special count: on that it would appear by reference to the agent, that within one month after the date of the agreement the defendant was to give bills at two months, so that by no means could the time of payment be enlarged beyond three months from the date of the agreement which was the 21st *May*, so that the goods were to be paid for on the 21st of *August* following.

That the action was of the present (*Michaelmas*) Term, and the writ not sued out till after the 21st of *August*, the time for [272] the performance of the contract being, therefore, expired, it became a debt for goods sold, and for such plaintiff had declared.

If the agreement was executory it should have been declared on, but it was here complete.

The defendant's counsel said the agreement within the exception of the statute were not of the description of the present, which involved other circumstances than that of a mere sale of goods, wares, and merchandizes.

Lord

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HERON *against* GRANGER.

Lord ELLENBOROUGH over-ruled both objections, but gave the defendant leave to move to enter a nonsuit if he thought fit.

Verdict for the plaintiff.

Solicitor-General, *Garrow*, and *Espinasse*, for the plaintiff.

Erskine and *Lawes* for the defendant.

It was not afterwards moved, and the plaintiff had judgment.

IN THE COMMON PLEAS.

GOLDING *against* NIAS.

Dec. 1st.

In replevin the party under whom the defendant makes conusance is not an admissible witness for the defendant.

THIS was an action of *replevin*.

The defendant made conusance; first, under one *Nicholas Fell*, who was stated to be the party beneficially entitled.

Secondly, under *Samuel Wayman Wadeson*, who was stated to be a trustee for Mr. *Fell*.

*Mr. *Wadeson* was called as a witness. He was objected to by the plaintiff's counsel, on the ground that the defendant claiming a right to make the distress by title under him, he was coming to support his own title.

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It was answered, that, in point of fact, he had no interest, but was a mere trustee, and *Douglas*, 840, was cited.

CHAMBRE, J. held him not admissible.

Shepherd, Serjt. and *Best*, for plaintiff.

Bailey, Serjt. for defendant.

Dec. 1st.

WORDSWORTH *against* WILLAN and Others.

Although the driver of a carriage is bound to leave sufficient room on the left-hand side of the road for other carriages to pass, he is only bound to keep it so as to leave sufficient room, it is matter of evidence whether sufficient room is left or not, in case any accident happens.

THIS was an action of trespass on the case, in which the plaintiff by his declaration complained that the defendant, by his servant, so negligently drove a certain coach of him the defendant, that the coach ran upon and against a certain horse whereon the plaintiff was then riding, that the thigh of the horse was broken, so that it became necessary that he should be killed.

The evidence was, that the plaintiff was on horseback on the proper side of the road going from *Highgate* to *Finchley*, and conversing with a lady on the footpath; that the defendant's coach drove furiously down the hill, which the plaintiff was then descending, that the horse being alarmed became *restive, and then jumped something about, the coach ran against him and broke his thigh.

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The case relied upon by the defendant was, that though there was a considerable distance to the other side of the road, that there was ample room left for the horse on the proper side of the road, between the coach and the footpath, and that the accident was caused by the restiveness of the horse, and not by reason of any neglect in the driver of the coach.

On the other hand, the plaintiff's counsel contended that there being no interruption to the carriage passing on its proper side of the road, that the coachman was bound to keep that side of the road, and that even if the restiveness of the plaintiff's horse had contributed to the accident, that the defendant was liable.

Mr. Justice ROOK said, that the counsel on both sides had carried the rule too far; the regulation as to travelling and preserving the proper side of the road, was founded in good sense, and was matter of public convenience; but that he could not lay it down that a carriage driving was under every circumstance to keep exactly to the left, or as it was called the proper side of the road; if there was no interruption of any other carriage, or the road was better, public convenience did not require that the driver should adhere to that law of the road; he took the rule of law to be, that if a carriage coming in any direction left sufficient room for any other carriage, horse, or assenger on its side of the way, that it was sufficient; but it

was

1805.

WORDSWORTH *against* WILLAN.

was matter of evidence if the defendant had done so, the driver was not to make experiments, he should leave ample room, and if an accident happened from want of that sufficient room, he was no doubt liable. He, therefore, left it to the Jury to say whether the accident had not been occasioned by the defendant's coachman having driven so near to the plaintiff's horse; that the action arose from that cause.

The Jury found for the plaintiff.

Cockell, Serjt. and for the plaintiff.

Best, Serjt. and *Wigley* for the defendant.

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[N the case of an insurance on goods, consigned to a particular place, if upon the ship's arrival at the destined port, it is in the hands of the enemy, that does not warrant an abandonment. *Lubbock* v. *Rowcroft.* *Page* 50

Affidavit.

If an execution is contested as fraudulent, on the ground that the defendant in that execution had but a short time previous issued an execution against the then plaintiff, on an old warrant of attorney, in which he had sworn that the then plaintiff was indebted to him, the affidavit so made is evidence after proof of the issuing of an execution upon a judgment signed on that affidavit. *Penn* v. *Scholey* and *Domvill*, Sheriffs of London. 244

Agent.

1. If an agent is employed to sell, what he says at the time of the sale will bind his principal; not what he has said at another time. *Helyear* v. *Hawke.* 72
2. If an agent, employed to sell on account of another any property, having notice that what he is about to sell does not belong to his principals, and notwithstanding sells it, he is liable in his own person. *Hardacre* v. *Stewart.* *Page* 103
 Vide *Auctioneer.*
3. Where an agent has been employed to pay money for work done, and the workmen are referred to him for payment, and he assents to it, an acknowledgment or promise to pay by him will, after six years, take the case out of the statute of limitations. *Burt*, Administrator, v. *Palmer.* 145
4. When a bill is drawn on an agent, and made payable out of a particular fund, and agent says he will pay it when he gets money of the principal; this is binding on him, and if he gets money at any subsequent time, is bound to pay the bill. *Stevens* v. *Hill.* 247

Agreement.

1. Where an agreement between several parties is offered in evidence, and it is objected to on the ground that it is not sufficiently stamped, by reason of the omission of a stamp; proof of that lies on the defendant, who makes the

the objection, it being a fact. *Waddington* v. *Francis.* *Page* 182

2. If a party has entered into a parol agreement for a lease, and a draft of it is prepared, though the agreement is void under the statute of frauds; yet, by an indorsement referring to the case on the draft by the party, admits the agreement, its being in writing is sufficient within the statute. *Shippey* v. *Derrison.* 190

3. When an attorney has entered into an agreement with a client, to conduct all his suits, in consideration of the client giving to him exclusively the drawing of his leases, if the client gives part of that business to other attornies, the attorney must either put an end to the agreement, or sue for breach of the agreement; for while it subsists, he is bound to the terms of it. *Parker* and *Rich* v. *Harcourt.* 249

4. An agreement respecting the sale of goods need not be stamped, though it contains stipulations concerning the mode of payment, and other things. *Heron* v. *Granger.* 269

Answer (in Chancery).

On an issue of *non est factum* to debt on bond, an answer to a bill filed in a court of equity, in which the execution of the bond is admitted, is not sufficient, unless some account is given of the subscribing witness, and why he is not called; for if he can be found he must prove it. Sir *John Call* v. *Dunning.* 16

Assault and Imprisonment.

Where there is a justification to a charge of false imprisonment, that a breach of the peace having been committed, the party was given in charge to an officer, the person described as an officer must be really so, and duly sworn into the office; not a patrol, or person employed in that way. *Cliffe* v. *Littlemore.* 39

Assignee.

Where a tenant, by lease, continues to hold after the expiration of it, as tenant at will, and assigns to another, the tenancy of the assignees shall be held to commence at the day on which it commenced under the lease, and a notice to quit on that day only is good, notwithstanding the assignee came in on a different day. *Doe ex dem. Castleton* and others *v. Samuel.* *Page* 173

Assignment.

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Assumpsit.

1. If a party did not mean to contract by deed, though there is a seal to the instrument, assumpsit may be maintained on it, the parties not meaning so to contract, and the words being *to which the party have put their hands* only. *Clement* v. *Gunhouse.* 83
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Attorney.

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2. An attorney is not bound to speak as to the particulars of a bill of exchange, when the knowledge of such particulars has only been derived from the bill

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3. The month required by the statute, 2d *Geo.* II. which an attorney's bill must be delivered before he commences an action to recover it, is a lunar month. *Hurd*, gent. v. *Leach.* 168

4. When an attorney has entered into an agreement with a client to conduct all his suits, in consideration of the client giving to him exclusively the drawing of his leases, if the client gives part of that business to other attornies, the attorney must either put an end to the agreement, or sue for breach of the agreement; for while it subsists he is bound to the terms of it. *Parker* and *Rich* v. *Harcourt.* 249

5. An attorney who signs an instrument, agreeing to give up certain bills of exchange, or certain things being done, is personally liable, unless he enters into the agreement as the attorney or agent, and it is so specified on the instrument. *Kendray* v. *Hodgson*, gent. one, &c. 223

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Where a person becomes bail above for another, he is entitled to recover all the expenses he has been put to by reason of it, and may therefore recover his expenses, in sending after the principal to take him, in order to render him; but not expenses of a suit improperly defended on such account. *Fisher* v. *Fallows. Page* 171

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1. A bankrupt cannot be called to explain an equivocal act of bankruptcy. *Hoffman*, assignee of *Phelps*, v. *Pitt.* 22

2. To support a plea of bankruptcy, if the date of the commission is subsequent to the date of the debt it is *primâ facie* evidence in bar of the plaintiff's recovering; but the plaintiff may shew a prior act of bankruptcy. *Pearson* v. *Fletcher.* 90

3. But if the proceedings are produced, the act of bankruptcy found by the proceedings shall be sufficient for the plaintiff, without proof of an actual act of bankruptcy. *Pearson* v. *Fletcher.* 91

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8. A builder, who buys timber, which he works into the houses which he builds, and sells when built, is not an object of the bankrupt laws. *Clark* v. *Wisdom.* 147

9. The

9. The rule that a bankrupt cannot be examined as to any matter necessary to support his bankruptcy, applies as well to cross-examination as to examination in chief. He, therefore, on examination cannot be asked a question as to the fact of any act of bankruptcy committed prior to that on which the commission is founded. *Wyatt*, assignee of *Algar*, v. *Wilkinson* and another. *Page* 187

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12. If a bankrupt, previous to his bankruptcy, has given a power of attorney to another to receive sums of money due to him, in consideration of engagements entered into by such person, on account of the bankrupt money received under such power, after the bankruptcy, may be recovered by the assignees. *Hovill*, assignee of——, a bankrupt, v. *Lethwaite*. 156

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Bastard.

1. A note given to the officers of a parish, to indemnify them against the expenses of a bastard child, is so taken as an indemnity only, as far as the parish have been put to expense, though not so expressed in the note. The maker may set up the defence that they were not damnified. *Wilde v. Griffin*. *Page* 142

2. The father of a bastard child, if he has adopted it as his own, though no order of bastardy has been made on him, he is liable for the nursing and necessaries furnished for its use. *Hesketh* v. *Gowing*. 131

Bill of Exchange.

1. If the acceptor of a bill of exchange, which has some time to run, discounts his own acceptance, and takes more than legal interest, it is not usury. *Barkley* v. *Walmsly* 11

2. If a promissory note of twenty years' date be unaccounted for, it is a presumption of payment. *Duffield* v. *Creed*. 52

3. In an action by an indorser of a bill of exchange, payable to the drawer's own order, against the acceptor, the drawer of the bill may be a witness to prove that there was usury in the discounting it. *Brard* v. *Ackerman*. 119

4. To charge the drawer of an unaccepted bill, some actual evidence of a demand to accept on the drawer, must be proved. It is not sufficient to call at the residence of the drawer, and acceptance to be refused by a person who was unknown to the person calling. *Check*, gent. v. *Roper*. 175

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6. If a bill is indorsed by procuration, it should be so stated in the declaration; for if the declaration states that the

the party indorsed it, his own proper hand being thereunto subscribed, and it appears to have been done by procuration from such party, it is a fatal variance. *Levy* v. *Wilson.* *Page* 180

7. Where notice of the dishonour of a bill has been given by letter, a copy of the letter cannot be given in evidence, as proof of notice of the bill having been dishonoured, unless notice has been given to produce it. *Langdon* v. *Hulls.* 156

8. When a bill is drawn on an agent, and made payable out of a particular fund, and agent says he will pay it when he gets money of the principal, this is binding on him, and if he gets money at any subsequent time, is bound to pay the bill. *Stevens* v. *Hill.* 247

Bond.

On an issue of *non est factum* to a declaration on a bond, an answer to a bill filed in a court of equity, in which the execution of the bond is admitted, is not sufficient, unless some account is given of the subscribing witness, and why he is not called; for if he can be procured, he must prove it. Sir *John Call* v. *Dunning.* 16

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If the opposite party calls for the other's book, he has not the option to use them or not, he thereby makes them evidence. *Wharam* v. *Routledge.* 235

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A builder, who buys timber, which he works into the houses which he builds, and sells when built, is not an object of the bankrupt laws. *Clark* v. *Wisdom.* 147

Carriage.

Although the driver of a carriage is bound to leave sufficient room on the left hand side of the road for other carriages to pass, he is only bound to keep it so as to leave sufficient room; it is matter of evidence whether sufficient room is left or not, in case any accident happens. *Wordsworth* v. *Willan* and others. *Page* 273

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Although the driver of a carriage is bound to leave sufficient room on the left hand side of the road for other carriages to pass, he is only bound to keep it so as to leave sufficient room; it is matter of evidence whether sufficient room is left or not, in case any accident happens. *Wordsworth* v. *Willan* and others. 273

Coals.

1. What is said by an agent respecting a contract or other matter, in the course of his employment, which contract or matter is the foundation of the action, is good evidence to affect the principal, *aliter*, what is said by him on another occasion. *Peto* v. *Hague.* 134

2. Where several persons in a club join to buy a quantity of coals, and afterwards subdivide their shares, and the coals are delivered to each measure, each person cannot maintain an action for the penalty against the seller, for

for the contract of sale is joint. *Everett q. t.* v. *Tindall.* *Page* 169

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1. If three persons are indicted for a conspiracy, two of whom are husband and wife, the wife cannot be a witness for the other defendant. *Rex* v. *Locker.* 117
2. Where there is evidence of several persons having engaged in a conspiracy, what is said by any of them at another time and place, respecting the object of the conspiracy, is evidence against the others. *Rex* v. *Salter* and others. 125

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In general cases, it is the duty of the shipper of goods to send notice of the shipping to the consignee; but that may be controlled by usage. *Goom* v. *Jackson.* 112

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Where there is a justification to a charge of false imprisonment, that a breach of the peace having been committed, the party was given in charge to an officer, the person described as an officer must be really so, and duly sworn into the office; not a patrol, or person employed in that way. *Cliffe* v. *Littlemore.* 39

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Court of Conscience.

An occasional underwriting of a policy at *Lloyd's*, and having a seat there, is not a seeking a livelihood within the city of *London*, so as to subject the party to the jurisdiction of the *Court of Conscience*, if he has a residence elsewhere: it must be followed as a trade or business. *Miller* v. *Williams.* 19

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A temporary use of a room in a public-house, for the purpose of dancing on a particular festival or occasion, does not subject the owner to the penalty of the statute 22d *Geo.* III. *Shutt* v. *Lewis.* 127

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Assumpsit will lie on an instrument to which a seal has been affixed if it appears that the parties did not mean so to contract; and the terms of the execution being *to which they have put their hands* not seals. *Clement* v. *Gunhouse.* 83

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The publication in a newspaper of the depositions taken before a justice of the peace on a criminal charge, before the party is tried, is libellous and a misdemeanor; neither can the printer, on an information against him for a libel, give them in evidence, to shew that they were truly published. *Rex* v. *Lee* and another. 123

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A temporary use of a room in a public-house, for the purpose of dancing on a particular festival or occasion, does not subject the owner to the penalty of

of the statute 22 *Geo.* III. *Shutt* v. *Lewis.* *Page* 127

E.

Ejectment.

1. Where a right of entry is given for assigning or underletting premises, if a person is found in possession of the premises, appearing as the tenant, it is *prima facie* evidence of an underletting, sufficient to call upon the defendant to shew in what character the party was in possession, as tenant or servant to the lessee. *Doe ex dem. Hindley* v. *Rickarby.* 4
2. Where there are three joint trustees of an estate, notice to quit or discontinue the possession given by two, is bad, even though given in the names of three, and the third trustee afterwards adopts it, and joins in the demise in ejectment. *Right ex dem. Fisher, Hyrons,* and *Nash,* v. *Cuthell.* 149
3. The mere leaving of a notice to quit at the tenant's house, without further proof of its being delivered to a servant and explained, or that it came to the tenant's hands, is not sufficient to support an ejectment. *Doe ex dem. Buross* and others v. *Lucas* and others. 153

Entry.

Vide *Ejectment.*

Escape.

In an action against the marshal for an escape, in which plaintiff declares that the person suffered to escape was indebted to him for goods sold and delivered, and that he sued out the process on which the party was arrested on that account, the averment in the declaration is not supported by shewing that the goods were sold on a credit which had not lapsed when the action was commenced. *White* v. —— *Jones,* Esq. marshal of the King's Bench. 160

Estoppel.

Vide *Record.*

Evidence.

1. In an ejectment on a breach of covenant, not to assign or underlet premises, it is *prima facie* evidence of an underletting, that a person is seen in possession, appearing as the tenant, sufficient to call on the defendant to shew in what character such person was in possession, as tenant or servant to the lessee. *Doe ex dem. Hindley* v. *Rickarby.* *Page* 4
2. An averment that a writ has issued and been returned, "as by the said writ and return now remaining in court may appear," cannot be supported unless it be shewn that it had been filed, and an office copy offered in evidence. *Turner* v. *Eyles.* 8
3. In an action for words imputing dishonesty to a servant, by which he has lost a place, evidence of antecedent good conduct is admissible. *King* v. *Waring et Ux.* 13
4. On an issue of *non est factum* to a declaration on a bond, an answer to a bill filed in a court of equity, in which the execution of the bond is admitted, is not sufficient, unless some account is given of the subscribing witness, or why he is not called; for if he can be procured, he must prove it. *Sir John Call* v. *Dunning.* 16
5. In an action of trespass *vi et armis,* for driving a chaise against another and injuring it, the plaintiff must prove the defendant the owner to have been actually driving; for if driven by a servant, the master would not be liable in trespass. *Leame* v. *Bray.* 18
6. In an action on a guarantee to pay for goods delivered to a third person, what such third person said respecting those goods, is not evidence to charge the party who gave the guarantee; the delivery must be proved. *Evans et al.* v. *Beattie,* executors. 26
7. Where a person who had been examined as a witness at a former trial

is dead, what he swore at the trial may be proved by a witness, who heard him give his evidence at such former trial. *Strutt* v. *Bovingdon*. *Page* 56

8. Where a question of right of water has been tried in an action on the case, the record of the verdict on that trial is evidence in a second action against the same defendant, though there are other defendants in the new action, if they all claim under him. *Strutt* v. *Bovingdon*. 58

9. To prove a right to the soil, acts of ownership exercised by one party is conclusive evidence against a supposed title, from boundaries which have never been ascertained. *Curzon et al.* v. *Lomax*. 60

10. To prove a person an owner of a ship, proof of his having paid bills and charges on the ship is sufficient. *Thomas* v. *Foyle*. 88

11. Where bankruptcy is pleaded the date of the commission, if it is subsequent to the date of the debt, is sufficient in support of the defendant's plea in bar. *Pearson* v. *Fletcher*. 90

12. If the proceedings are produced, the act of bankruptcy found by them is sufficient, without proof of the actual act of bankruptcy. *Ibid. ibid.*

13. A note given for money advanced by a candidate at an election as a bribe, though without a stamp, may be given in evidence of the bribery. *Dover* v. *Maestaer*. 92

14. If the declaration avers generally the defendant to be a meter for superintending the delivery of coals, proof that he is a deputy coal-meter is sufficient. *Davey* v. *Lowe*. 70

15. What was said by an agent having authority to sell, at the time of the sale, is admissible evidence; but not what he has said at another time. *Helyear* v. *Hawke*. 72

16. The book kept at the sick and hurt office, containing copies of the returns made by officers of persons who have died on board of King's ships, is evidence of the death of seamen. *Wallace* v. *Cook*. *Page* 117

17. A receipt for interest indorsed on a promissory note, without a stamp (and which cannot therefore be given in evidence) is evidence to go to the jury; from which they may perceive, that from the payment of so much for interest there was a principal sum in proportion due. *Manley et Ux.* v. *Peel*. 120

18. The day-book kept at the judgment office is not evidence to prove the time of the signing of a judgment. *Lee* v. *Meecock*. 177

19. If a bill is indorsed by procuration, it should be so stated in the declaration; for if the declaration states that the party indorsed it, his own proper hand-writing being thereunto subscribed, and it appears to have been done by procuration from such party, it is a fatal variance. *Levy* v. *Wilson*. 180

20. The rule that a bankrupt cannot be examined as to any matter necessary to support his bankruptcy, applies as well to cross-examination as to examination in chief; he, therefore, on examination cannot be asked a question as to the fact of any act of bankruptcy committed prior to that on which the commission is founded. *Wyatt*, assignee of *Algar*, v. *Wilkinson* and another. 187

21. Where there is evidence of several persons having engaged in a conspiracy, what is said by any of them at another time and place, respecting the object of the conspiracy, is evidence against the others. *Rex* v. *Salter* and others. 125

22. If the declaration in an action for a false return on a *fi. fa.*, in setting out the writ, states the indorsement to levy the sum, together with the sheriff's poundage, officers' fees and other legal charges and incidental expenses attending the same, and the writ when produced is to levy the sum, together with the sheriff's poundage, officers' fees, &c. it is a variance. *Stiles* v. *Rawlins*, and another. 133

23. What

23. What is said by an agent respecting a contract or other matter, in the course of his employment, which contract or matter is the foundation of the action, is good evidence to affect the principal, *aliter*, what is said by him on another occasion. *Peto* v. *Hague.* *Page* 134

24. In case for a libel published in a weekly paper, after proof, the buying of the paper at the defendant's shop, in which the libel was contained: evidence of similar papers purchased at the defendant's shop at other times is admissible evidence to shew that the paper was regularly published, and that the libellous publication was deliberately made. *Plunkett* v. *Cobbett.* 136

25. A speculative opinion in a book of the same tendency as the libel, may be read as part of the counsel's speech: but if the extract is the representation of a fact it cannot be read, unless the counsel calls witnesses to prove it. *Plunkett* v. *Cobbett.* 138

26. In an action against the marshal for an escape, in which plaintiff declares that the person suffered to escape was indebted to him for goods sold and delivered, and that he sued out the process on which the party was arrested on that account, the averment in the declaration is not supported by shewing that the goods were sold on a credit which had not lapsed when the action was commenced. *White* v.—*Jones*, Esq. marshal of the King's Bench. 160

27. When a declaration is not specially entitled, but refers to the first day of term, and the cause of action proved is subsequent to the first day of term, the production of the writ, shewing the true time of its being sued out, is sufficient, if it was subsequent to the cause of action. *Rhodes* v. *Gibbs.* 163

28. Where several persons in a club join to buy a quantity of coals, and afterwards subdivide their shares, and the coals are delivered to each measure, each person cannot maintain an action for the penalty against the seller, for the contract of sale is joint. *Everett q. t.* v. *Tindall.* *Page* 169

29. If there has been an encroachment on the highway, and the person removes it, and repairs that part of the highway which was injured by the encroachment, and then leaves it to the trustees or parish to repair in future, he shall not be liable in future: but if the proprietor of the adjoining land has for any length of time repaired, it is evidence of his liability, unless he gives positive evidence of encroachment. *Rex* v. *Skinner.* 219

30. An examined copy from the books of the manor, that certain pits have been demised, is evidence without production of the books themselves to shew that they were demisable by custom. *Doe ex dem.* Churchwardens of *Croydon* v. *Cook.* 221

31. Declaration in case for negligently steering, managing, and directing a ship, by which another ship was injured, is not supported by evidence, shewing that it proceeded from unskilfully stowing the anchor, so that it caught hold of the other vessel and broke into her side. *Hullman* v. *Bennett.* 226

32. Vide *Rex* v. *Budd.* 230

33. In a criminal information, the information stated that an order had been made to land goods at the quay or wharf appointed by law. That averment is not supported by proving an order to land them at the king's warehouses, though it stands on the wharf or quay. *Rex* v. *Cassano.* 231

34. The gazette alone is not evidence of the appointment of an officer to a commission in the army. *Kirwan* v. *Cockburn.* 233

35. If the opposite party calls for the other's books, he has not the option to use them or not, he thereby makes them evidence. *Wharam* v. *Routledge.* 235

36. If an execution is contested as fraudulent, on the ground that the defendant in that execution had but a short time previous issued an execu-

tion against the then plaintiff, on an old warrant of attorney, in which he had sworn that the then plaintiff was indebted to him, the affidavit so made is evidence, after proof of the issuing of an execution upon a judgment signed on that affidavit. *Penn* v. *Scholey* and *Domvill*, sheriffs of *London*. *Page* 213

F.

Felony.

Felony cannot be committed in stealing oysters from off an oyster-bed in an arm of the sea, though brought there for the purpose of breeding. *Rex* v. *Walford*. 62

Fixtures.

Fixtures not separated from the freehold, cannot be recovered under a count for goods sold. *Nutt* v. *Butler*. 176

Forgery.

If a person offers in evidence a paper as a copy of a receipt in which words are interpolated, not in the original, it is forgery. *Upfold* v. *Leet*. 100

Fraud.

The not taking possession under an assignment or a bill of sale, is not conclusive evidence of fraud; there must be something more to shew it fraudulent. *Hoffman* assignee of *Phelps* v. *Pitt*. 22

Frauds, Statute of,

1. If a party has entered into a parol agreement for a lease, and a draft of it is prepared, though the agreement is void under the statute of frauds, yet by an indorsement referring to the case on the draft by the party, admits the agreement, it being in writing is sufficient within the statute. *Shippey* v. *Derrison*. 190
2. When goods are sold by sample, and the sample delivered as part of the bulk, and the bulk thereby diminished. This is a part delivery within the statute of frauds. *Klinitz* v. *Surry*. *Page* 267
3. It is not a good note in writing of the sale of goods, if the name of both buyer and seller are not used, and it should be signed by both, or their agents. *Champion* v. *Plummer*. 240
4. When a person is told by two parties that he is to be the broker to make a contract between them for the sale of goods, and he in consequence reduces it into writing, and sends a sale note of the terms to each party, this is a valid contract within the statute of frauds. *Chapman* v. *Partridge*. 256

G.

Gazette.

The gazette alone is not evidence of the appointment of an officer to a commission in the army. *Kirwan* v. *Cockburn*. 233

Gaol.

A single magistrate is not liable to pay for the expenses incurred in preparing plans for a county gaol, advertised for by the sessions, of which he was one. *Tuck* and another, executors of *Carter*, v. *Ruggles*, Esq. 237

Goods.

If the declaration in an action for goods sold and delivered state them to be the goods of the plaintiff, and they appear to have been the property of the plaintiff and another, though sold by the plaintiff, it is a fatal variance. *Ditchburn* v. *Spracklin* and others. 31

Vide *Guarantee*.

Goods sold.

Fixtures, not separated from the freehold, cannot be recovered under a count

count for goods sold. *Nutt* v. *Butler*. *Page* 176

Guarantee.

In an action on a guarantee to pay for goods delivered to a third person, what such third person said respecting those goods, is not evidence to charge the party who gave the guarantee; the delivery must be proved. *Evans et al.* v. *Beattie*, executors. 26

H.

Highway.

If there has been an encroachment on the highway, and the person removes it, and repairs that part of the highway which was injured by the encroachment, and then leaves it to the trustees or parish to repair in future; he shall not be liable in future: but if the proprietor of the adjoining land has for any length of time repaired it, it is evidence of his liability, unless he gives positive evidence of encroachment. *Rex* v. *Skinner*. 219

I.

Indemnity.

When a person becomes bail above for another, he is entitled to recover all the expenses he has been put to by reason of it, and may therefore recover his expenses in sending after the principal to take him, in order to render him; but not expenses of a suit improperly defended on such account. *Fisher* v. *Fallows*. 171
See *Parish*. *Wilde* v. *Griffin*. 142

Indictment.

1. On a joint indictment agninst several for a misdemeanor, a defendant, who had suffered judgment to go by default, cannot be called as a witness for others. *Rex* v. *Lafone*, *Hopburn*, *Davis*, *Billiter*, and another. 154
Vide *Rex* v. *Budd*. 230

3. In a criminal information, the information stated that an order had been made to land goods at the quay or wharf appointed by law, that averment is not supported by proving an order to land them at the King's warehouses, though it stands on the wharf or quay. *Rex* v. *Cassano*. *Page* 231

Infant.

1. Money lent to an infant to procure his liberation from an arrest, may come under the description of necessaries; and may be recoverable in assumpsit, if it appear that he was in custody for a debt for necessaries, or in execution. *Clarke* v. *Leslie*. 28
2. In a joint action, where one defendant pleads infancy, the plaintiff cannot enter a *noli prosequi* as to him, and proceed against the other. *Jaffray* v. *Frebain* and others. 47
3. To bind an infant on a promise to pay after full age, it must be made voluntarily, and with full notice that the party was then not liable by reason of his nonage. *Harmer* v. *Killing*. 102
4. Regimental clothes furnished to an infant, who was a member of a volunteer corps, are necessaries. *Coates* v. *Wilson*. 152

Insolvent.

The holder of an accommodation note, who has received a compensation, who covenanted not to sue the indorsee, for whose accommodation the note was made, may, notwithstanding, sue the maker; though on payment of it, *he* will have a right of action against the indorsee. *Mallet* v. *Thompson*. 178

Insurance.

1. In the case of an insurance on goods consigned to a particular port, if on the ship's arrival the intended port is in the hands of the enemy, that does not warrant

warrant an abandonment. *Lubbock* v. *Roxcroft.* *Page* 50

2. Where there is a policy on a ship, with liberty to touch and discharge goods at a certain place, even though there is a clause in the policy providing for a return of premium, if she sails from thence with convoy she is not warranted in taking in a cargo there. *Sheriff* v. *Potts.* 96

3. Neutral property, taken by a King's ship, though the Court of Admiralty pronounce for good cause of seizure, but order to be restored, is lawful object of insurance. *Visger* v. *Prescott.* 184

Interest.

If there is an agreement for tithes to be paid at a particular day, the sum will bear interest from that day; but on a general agreement for so much a year, without specifying any particular time, no interest is payable. *Shipley* v. *Hammond.* 114

Interrogatories.

Vide *Wheeler*, assignee of *Bryan*, v. *Atkins.* 246

Joint Contract.

Three persons binding themselves jointly and severally in a bond of indemnity, if two of them pay the whole money, they cannot join in an action for contribution against the third. *Kelby* and *Vernon* v. *Steel.* 194

Jointenants.

Where there are three joint trustees of an estate, notice to quit or discontinue the possession given by two, is bad, even though given in the names of the three, and the third trustee afterwards adopts it, and joins in the demise in ejectment. *Right ex dem. Fisher, Hyrons,* and *Nash,* v. *Cuthell.* 149

Judgment.

The day-book kept at the judgment office is not evidence to prove the time of the signing of a judgment. *Lee* v. *Meecock.* *Page* 177

Justice of Peace.

A single magistrate is not liable to pay for the expenses incurred, in preparing plans for a county gaol, advertised for by the sessions of which he was one. *Tuck* and another, executors of *Carter*, v. *Ruggles*, Esq. 237

L.

Landlord and Tenant.

Where a right of entry is given for assigning or underletting premises, if a person is found in possession of the premises, it is *prima facie* evidence of an underletting, sufficient to call on the defendant to explain in what character the party was so in possession. *Doe ex dem. Hindley* v. *Rickarby.* 4

Lease.

If a bankrupt deposit a lease before his bankruptcy, but no mortgage or assignment of it is made, it transfers no estate, but the assignees may recover it. *Doe ex dem. Maslin* v. *Roe.* 105

Vide *Landlord and Tenant*
See *Frauds, statute of. Shippey* v. *Derrison.* 190

Letter.

1. Though a letter giving a false character of a servant, may be the ground of an action, yet if it has been written as an answer to a letter, sent not with a view to obtain a character, but in order to obtain such an answer as might afford a ground of action, no action can be maintained. *King* v. *Waring et Ux.* 14

2. Where notice of the dishonour of a bill

bill has been given by letter, a copy of the letter cannot be given in evidence as proof of notice of the bill having been dishonoured, unless notice has been given to produce it. *Langdon* v. *Hulls.* *Page* 156

Libel.

Vide *Letter.*

1. The publication in a newspaper of the depositions taken before a justice of the peace on a criminal charge, before the party is tried, is libellous and a misdemeanor, neither can the printer, on an information against him for a libel, give them in evidence to shew that they were truly published. *Rex* v. *Lee* and another. 123
2. In case for a libel published in a weekly paper, after proof, the buying of the paper at the defendant's shop, in which the libel was contained; evidence of similar papers purchased at the defendant's shop at other times, is admissible evidence to shew that the paper was regularly published, and that the libellous publication was deliberately made. *Plunkett* v. *Cobbett.* 136

Limitations.

1. If a promissory note of twenty years' date be unaccounted for, it is a presumption of payment. *Duffield* v. *Creed.* 52
2. If a party says, He has no recollection of the debt, but relies on the statute, the statute is a good bar. *Aliter*, If he admits it unpaid. *Bryan* v. *Horseman.* 81

Limitations, Statute of

Where an agent has been employed to pay money for work done, and the workmen are referred to him for payment, and he assents to it, an acknowledgment or promise to pay by him, will, after six years, take the case out of the statute of limitations. *Burt*, administrator, v. *Palmer.* 145

London.

An occasional underwriting a policy at *Lloyd's*, and having a seat there, is not seeking a livelihood within the city of *London*, so as to subject the party to the jurisdiction of the *Court of Conscience;* if he has a residence elsewhere: it must be followed as a trade or business. *Miller* v. *Williams.* *Page* 19

M.

Master and Servant.

1. In an action of trespass *vi et armis*, for driving a chaise against another, and injuring it, the plaintiff must prove the defendant the owner to have been actually driving; for if driven by a servant, the master would not be liable in trespass. *Leame* v. *Bray.* 18
2. The owner of chaises and horses let to hire, is liable to an action for any damage arising from the negligence of his drivers, and not the party who hires them: he may therefore maintain trespass *vi et armis* against the hirer for any injury done to his horses or carriages while so let to hire. *Dean* v. *Branthwaite.* 35
3. If a master gives his servant money beforehand to pay for goods, and the servant embezzles the money, the master is not liable; but if he authorizes the servant to take up goods on credit, and he does so, and the master afterwards gives him the money to pay, which he does not so apply, the master is liable. *Rusby* v. *Scarlett.* 76

N.

Negligence.

It is no defence to an action for negligently driving a chaise against another that the one driven against was on the wrong side of the road, if there was room sufficient to pass without inconvenience. *Clay* v. *Wood.* 44

Newspaper.

The publication in a newspaper of the depositions taken before a justice of the peace on a criminal charge, before the party is tried, is libellous and a misdemeanor; neither can the printer, on an information against him for a libel, give them in evidence, to shew that they were truly published. *Rex* v. *Lee* and another. *Page* 123

Notice.

1. A notice served at seven o'clock the evening preceding the day of a trial to produce papers at the trial, is not sufficient notice. *Sims* v. *Kitchen.* 46
2. Notice to quit may be given to a tenant by parol, and where there are two tenants of premises held in common, notice to one is sufficient. *Doe ex dem.* Lord *Macartney* v. *J. Crick* and *William Crick.* 196

See *Tenant. Doe ex dem. Buross* and others, v. *Lucas* and others. 153

See *Letter. Langdon* v. *Hulls.* 156

O.

Officer.

Where there is a justification to a charge of false imprisonment, that a breach of the peace having been committed, the party was given in charge to an officer, the person described as an officer must be really so, and duly sworn into the office; not a patrol, or person employed in that way. *Cliffe* v. *Littlemore.* 39

Oyster.

It is not felony to steal oysters off the oyster-lays, which are in an arm of the sea, to which the oysters are brought, and which are not the natural production of the place. *Rex* v. *Walford.* 62

P.

Parish.

A note given to the officers of a parish, to indemnify them against the expenses of a bastard child, is to be taken as an indemnity only as far as the parish have been put to expense, though not so expressed in the note. The maker may set up the defence that they were not damnified. *Wilde* v. *Griffin.* *Page* 142

Parliament.

The Speaker, or a Member of Parliament, may be called upon to give evidence of the fact of a Member of Parliament having taken part, or spoken on a particular debate; but he cannot be asked as to what he knew delivered in the course of the debate. *Plunkett* v. *Cobbett.* 137

Partner.

Vide *Ship.*

A partner who suffers his name to be used in a firm as a partner, if in fact he is not so, nor has any share in the business or profits, may be a witness for the person whose name is joined with his, and who is the only person entitled in action for goods sold. *Parsons* v. *Crosby.* 199

Payment.

1. Payment of money into court is not of itself so an admission of the plaintiff's right to recover; but may be explained *quo animo* it was done. *Hildyard* v. *Blowers.* 69
2. A payment to a person acting under a power of attorney, after the person who gave the power is dead, is a void payment: the death of the party being a revocation of the power. *Wallace* v. *Cook.* 117
3. Perjury at common law may be pardoned; and if a witness is produced, who has been so convicted, he must produce his patent of pardon, *ex parte Saville. Dover* v. *Maestaer.* 92

Pleading.

Pleading.

1. Where an auctioneer has sold premises, the title to which being contested, and he refusing to return the deposit, an action is brought, in which he afterwards pays the costs, he cannot recover those costs against the principal in an action for money paid; but must declare specially. *Spurrier* v. *Elderton.* *Page* 1
2. An averment in a declaration, "as by the said writ and return thereon now remaining in court more fully appears," can only be proved by shewing that it has been actually filed, and producing an office-copy. *Turner* v. *Eyles.* 8
3. If the declaration in an action for goods sold and delivered, state them to be the goods of the plaintiff, and they appear to have been the property of the plaintiff and another, though sold by the plaintiff, it is a fatal variance. *Ditchburn* v. *Spracklin* and others. 31
4. In an action of debt *q. t.* for selling coals contrary to law, the contract for the sale of the coals must be truly stated, and any variance is fatal; therefore where the declaration stated the offence to have been committed on a sale of coals to two persons, and it appears to have been a sale to him and another, though the declaration stated the exact quantity which the two were to receive, it is a fatal variance. *Parish q. t.* v. *Burwood.* 33
5. If to an action on a bail-bond the defendant plead *nil debet*, and the plaintiff does not demur, but takes issue, it lets the defendant into any defence he may have to the action. *Rawlins & al.* v. *Danvers.* 38
6. In a joint action, where one defendant pleads infancy, the plaintiff cannot enter a *noli prosequi* as to him, and proceed against the other. *Jaffray* v. *Frebain* and others. 47
7. In declaring under the statute 5 *Eliz. c.* 5. for following a trade, the true trade must be set out; describing the party as following a branch of it will not be sufficient. *Spencer* v. *Mann.* *Page* 110

Power of Attorney.

If a bankrupt, previous to his bankruptcy, has given a power of attorney to another, to receive sums of money due to him, in consideration of engagements entered into by such person on account of the bankrupt, money received under such power, after the bankruptcy may be recovered by the assignees. *Hovill*, assignee of ——— a bankrupt, v. *Lethwaite.* 358

Practice.

1. A notice to produce papers served at seven o'clock in the evening preceding a trial, is too short to entitle the party to insist on the production of the papers. *Sims* v. *Kitchen.* 46
2. In a joint action, where one defendant pleads infancy, the plaintiff cannot enter a *noli prosequi* as to him, and proved against the other. *Jaffray* v. *Frebain* and others. 47
3. Payment of money into court is not of itself an admission of the plaintiff's right to recover; but may be explained *quo animo* it was done. *Hildyard* v. *Blowers.* 69

R.

Receipt.

Vide *Evidence.*

Record.

1. An averment in a declaration, "as by the said writ and return thereon now remaining in court more fully appears," can only be proved by shewing that it has been actually filed, and producing an office-copy. *Turner* v. *Eyles.* 8
2. Where a question of right has been tried in an action on the case, the record

record of that trial, though not an *estoppel*, is conclusive evidence as to the right, against the same party on the record and those claiming under him. *Strutt* v. *Bovingdon.* *Page* 58

3. Defendant pleads a judgment by reason of the non-performance of several promises and undertakings. The record, when produced, was a judgment on one count only, on a bill of exchange referred to the prothonotary, and a *remittitur damna* as to all the other counts. It is a variance, and does not sustain the plea. *Read* v. *Borradaile* and others. 223

Replevin.

In replevin, the party under whom the defendant makes cognizance, is not an admissible witness for the defendant. *Golding* v. *Nias.* 272

Road.

Vide *Negligence.*

S.

Sailor.

1. Though a ship, when she sails on a voyage, is not seaworthy, and after having performed part of the voyage is in consequence obliged to put into port, and compelled to abandon the voyage, that does not give the sailors a right to recover any wages, no freight being earned. *Eaken* v. *Thom.* 6
2. Where assumpsit will lie on sailors' articles, though under seal. Vide *Assumpsit and Deed.*
3. A sailor, retained under certain wages by articles, cannot claim any money as *gratuity money* due by usage. *Elsworth* v. *Woolmore.* 84

Vide *Evidence.*

Sale.

1. Where an auctioneer has sold premises, the title to which being contested, and he refusing to return the deposit, an action is brought, in which he afterwards pays the costs, he cannot recover those costs against the principal in an action for money paid, but must declare specially. *Spurrier* v. *Elderton.* *Page* 1

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2. It is not a good note in writing of the sale of goods, if the name of both buyer and seller are not used, and it should be signed by both, or their agents. *Champion* v. *Plummer.* 240
3. When goods are sold by sample, and the sample delivered in part of the bulk, and the bulk thereby diminished. This is a part delivery within the statute of frauds. *Klinitz* v. *Surry.* 267
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Sheriff.

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Ship.

1. Though a ship, when she sails on a voyage, is not seaworthy, and after having performed part of the voyage, is in consequence compelled to abandon the voyage, and obliged to put into port, that does not give the sailors a ight to recover any wages, no freight being earned. *Eaken* v. *Thom.* 6
2. If a person who supplies stores to a ship, of which there are several owners, takes in payment the bill of the ship's husband (a part owner) and settles with him alone, he thereby discharges the other owners, particularly if the bill is renewed. *Read* v. *White* and others. 121
3. To establish the fact of a person being the

the owner of a ship, evidence of his having paid for stores, &c. is *primâ facie* sufficient. *Thomas* v. *Foyle*. P. 89

4. If a ship gets aground, and cannot be got off in the opinion of competent persons, the captain may sell for the owner's benefit; but it must be done only in cases of extreme necessity, and be purely *bonâ fide*. *Hayman* v. *Molton*. 65

Vide *Sailor*.

Slander.

1. Though a letter, giving a false character of a servant, may be the ground of an action, yet if it has been written as an answer to a letter, sent not with a view to obtain a character, but in order to obtain such an answer as might afford a ground of action, no action can be maintained. *King* v. *Waring et Ux*. 14
3. In an action for words imputing dishonesty to a servant, by which he has lost a place, evidence of antecedent good conduct is admissible. *Same Case*.
4. Words spoken to a committee of a Volunteer Corps, respecting a member, charging him with improper principles, are not actionable, if that committee have the general direction of the corps. *Barbaud* v. *Hookham*. 109

Stamp.

1. A note for money given to voters as a bribe, may be given in evidence of the bribery in an action on the statute, though it has no stamp. *Dover* v. *Maestaer*. 92
2. Where an agreement between several parties is offered in evidence, and it is objected to on the ground that it is not sufficiently stamped, by reason of the omission of a stamp, proof of that lies on the defendant, who makes the objection, it being a fact. *Waddington* v. *Francis*. 182
3. An agreement respecting the sale of goods need not be stamped, though it contains stipulations concerning the mode of payment and other things. *Heron* v. *Granger*. Page 269

Statute.

1. By the statute 2 *Geo*. II. *c*. 3. which regulates sailors' wages and contracts, no money but what is reserved by the articles, can be claimed; nor can any usage sanction a claim for any thing in the form of a gratuity. *Elsworth* v. *Woolmore*. 85
2. The statute of 7 *Geo*. I. c. 31, respecting contingent debts, applies to written securities only. *Parslow* v. *Dearlove*. 78
3. In an action on the 5th of *Eliz*. c. 3. for following a trade, the trade must be accurately described. *Spencer q. t.* v. *Man*. 110
4. An occasional under-writing of a policy at *Lloyd's*, and having a seat there, is not "a seeking a livelihood within the city of *London*," sufficient to subject a party to the *Court of Conscience* act, if he has a residence elsewhere: it must be followed as a trade or business. *Miller* v. *Williams*. 29

Statute 22 *Geo*. II.

See *Dancing*

Stock.

1. The seller of stock is not bound to be at the place ready to make the transfer on the day of the purchase; a reasonable degree of promptness is sufficient. *Bourdenave* v. *Gregory*. 115
2. In order to entitle a party to recover the difference arising from a resale of stock, which the defendant had contracted to purchase, it is not necessary that the resale should take place on the next transfer-day. *Same Case*.
3. An agreement for the purchase of stock, to be transferred at a future day, at a price below the then value, is not usurious. *Pike* v. *Ledwell* and *Ann Monprivatt*. 164

T.

Tenant.

1. The mere leaving of a notice to quit at the tenant's house, without further proof of its being delivered to a servant and explained, or that it came to the tenant's hands, is not sufficient to support an ejectment. *Doe ex dem. Buross* and others v. *Lucas* and others. *Page* 153
2. Where a tenant by lease continues to hold after the expiration of it, as tenant at will, and assigns to another, the tenancy of the assignees shall be held to commence at the day on which it commenced, under the lease, and a notice to quit on that day only is good, notwithstanding the assignee came in on a different day. *Doe ex dem. Castleton* and others v. *Samuel.* 173
3. Notice to quit may be given to a tenant by parol, and where there are two tenants of premises held in common, notice to one is sufficient. *Doe ex dem.* Lord *Macartney* v. *J. Crick* and *William Crick.* 196
4. Money paid to a landlord, who was about to distrain, by a trader after an act of bankruptcy committed, is not recoverable back by the assignees. *Stevenson & al.* assignees of *Knight*, a bankrupt, v. *Wood.* 200

Tender.

A tender of money, with a demand of a receipt in full, and refused on that ground, is not a good tender; neither is it a good tender where the money is not in sight, for it cannot appear that if the party was willing to have accepted it, it could have been immediately paid: it should be at hand, and capable of immediate delivery. *Glascott* v. *Day.* 48

Term.

When a declaration is not specially entitled, but refers to the first day of term, and the cause of action is subsequent to the first day of term, the production of the writ, shewing the true time of its being sued out, is sufficient if it was subsequent to the cause of action. *Rhodes* v. *Gibbs.* *Page* 163

Title.

1. To prove a right to the soil, acts of ownership exercised over it by one party are conclusive evidence against a supposed title, from boundaries which have never been ascertained. *Curzon et al.* v. *Lomax.* 60
2. In a question respecting a right of water, the record in a former action respecting the same right, is evidence in a second action against the same defendant, and all claiming under him. *Strutt* v. *Bovingdon.* 56

Trade.

In an action on the statute 5 *Eliz. c.* 5, respecting trades, the trade must be accurately described; it will not be sufficient to state a subordinate branch of a general trade. *Spencer q. t.* v. *Man.* 110

Vide *Usage.*

Trespass.

1. In an action of trespass *vi et armis*, for driving a chaise against another and injuring it, the plaintiff must prove the defendant the owner to have been actually driving it; for if driven by his servant, the master would not be liable to trespass. *Leame* v. *Bray.* 18
2. The owner of chaise and horses let to hire, is liable to an action for any damages from the negligence of the drivers, and not the party hiring: the owner may therefore maintain trespass *vi et armis*, against the hirer for any damage done to them by the hirer, whilst so let to hire. *Dean* v. *Branthwait.* 35

Tythes.

Vide *Interest.*

Usage.

U.

Usage.

1. In general cases the shipper of goods is bound to give notice of the shipping; but this may be controlled by the usage of trade. *Goom* v. *Jackson.* *Page* 112
2. No usage can sanction a claim by sailors for a gratuity beyond the sum specified in their articles. *Elsworth* v. *Woolmore.* 84

Usury.

1. If the acceptor of a bill of exchange which has some time to run, discounts his own acceptance, and takes more than legal interest, it is not usury. *Barclay q. t.* v. *Walmsley.* 11
 Vide *Witness.*
2. An agreement for the purchase of stock to be transferred at a future day, at a price below the then value is not usurious. *Pike* v. *Ledwell* and *Ann Monprivatt.* 164

V.

Variance.

1. An averment in a declaration "as by the said writ and return now remaining in court may appear," can only be proved by shewing it to have been actually filed, and producing an office-copy. *Turner* v. *Eyles.* 8
2. If the declaration in an action for goods sold and delivered state them to be the goods of the plaintiff, and they appear to have been the goods of the plaintiff and another person, the variance is fatal. *Ditchburn* v. *Spracklin* and others. 31
3. If the declaration describes a party as a meter, generally, for superintending the measuring of coals, the averment is supported by shewing him to be a deputy meter. *Davey* v. *Lowe.* 70
4. Defendant pleads a judgment, by reason of the non-performance of several premises and undertakings. The record, when produced, was a judgment on one count only, on a bill of exchange referred to the prothonotary, and a *remittitur damna* not as to all the other counts. It is a variance, and does not sustain the plea. *Read* v. *Borradaile* and others. *Page* 233
5. Declaration in case for negligently steering, managing, and directing a ship, by which another ship was injured, is not supported by evidence, shewing that it proceeded from unskilfully stowing the anchor, so that it caught hold of the other vessel, and broke into her side. *Hullman* v. *Bennett.* 226
6. In a criminal information, the information stated, that an order had been made to land goods at the quay or wharf appointed by law. That averment is not supported by proving an order to land them at the King's warehouse, though it stands on the wharf or quay. *Rex* v. *Cassano.* 231
7. A declaration for not delivering soil or breeze is not supported by proving an agreement to deliver soil only, soil and breeze being different things. *Clark* v. *Manstone.* 339

W.

Wages.

1. Though a ship, when she sails on a voyage, is not sea-worthy; and after having performed part of the voyage, is in consequence obliged to put into port, and compelled to abandon the voyage, that does not give the sailors a right to recover any wages, no freight being earned. *Eaken* v. *Thom.* 6
2. Where assumpsit will lie on sailors' articles for wages, though under seal. Vide *Assumpsit* and *Deed.*
3. A sailor retained under certain wages by articles, cannot claim any money as gratuity money due by usage. *Elsworth* v. *Woolmore.* 84

Warranty.

1. If a warranty is given by an agent on

a sale, what he has said at the time of the sale is good evidence; but not what he has said at another time. *Helyear* v. *Hawke*. *Page* 72

2. A person, who was the former proprietor of a horse, and which he sold with a warranty, may be a witness to prove the soundness when he sold it. *Briggs* v. *Crick*. 99

Witness.

1. On an issue of *non est factum* to a declaration on a bond, an answer to a bill filed in a court of equity, in which the execution of the bond is admitted, is not sufficient unless some account is given of the subscribing witness, and why he is not called; for if he can be procured, he must prove it. Sir *John Call* v. *Dunning*. 16
2. A bankrupt cannot be called to explain an equivocal act of bankruptcy. *Hoffman*, assignee of *Phelps*, v. *Pitt*. 22
3. In an action for work and labour, or goods sold, a witness may be asked as to the particular sum which was paid for any part of the work done, or goods charged for. *Fricker* v. *French*. 79
4. A person who was the former proprietor of and sold a horse, with a warranty, may be a witness to prove his soundness when he sold it. *Briggs* v. *Crick*. 99
5. If three persons are indicted for a conspiracy, the wife of one cannot be a witness for the other. *Rex* v. *Locker*. 107
6. In an action by the indorser of a bill of exchange against the acceptor, the drawer of the bill to whose order it was payable, and who indorsed it to the plaintiff, may be a witness to prove that there was usury in the discounting of the bill. *Brand* v. *Ackerman*. *Page* 119
7. On a joint indictment against several for a misdemeanor, a defendant, who had suffered judgment to go by default, cannot be called as a witness for the others. *Rex* v. *Lafone*, *Hopburn*, *Davis*, *Billiter*, and another. 154
8. A person who suffers his name to be used in a firm as a partner, if in fact he is not so, nor has any share in the business or profits, may be a witness for the person whose name is joined with his, and who is the only person entitled in action for goods sold. *Parsons* v. *Crosby*. 199
9. In replevin the party under whom the defendant makes cognizance, is not an admissible witness for the defendant. *Golding* v. *Nias*. 272

Writ.

If the declaration in an action for a false return on a *fi. fa.*, in setting out the writ, states the indorsement to levy the sum, together with the sheriff's poundage, officers' fees, and other legal charges and incidental expenses, attending the same, and the writ, when produced, is to levy the sum, together with the sheriff's poundage, officers' fees, &c. it is a variance. *Stiles* v. *Rawlins* and another. 133
See *Term*. *Rhodes* v. *Gibbs*. 272

END OF VOL. V.

PRINTED BY J. AND T. CLARKE, ST. JOHN-SQUARE, LONDON.

ESPINASSE'S REPORTS

AT

Nisi Prius.

VOLUME VI.

REPORTS

OF

CASES

ARGUED AND RULED

AT

Nisi Prius,

IN

THE COURTS OF KING'S BENCH

AND

COMMON PLEAS,

FROM HILARY TERM, 46 GEO. III. 1806,
TO TRINITY TERM, 47 GEO. III. 1807.
BOTH INCLUSIVE.

BY ISAAC ESPINASSE,
OF GRAY'S INN, ESQ. BARRISTER AT LAW.

VOL. VI.

London:
PRINTED FOR J. BUTTERWORTH, FLEET STREET;
AND J. COOKE, DUBLIN.
By R. WILKS, *Chancery Lane, Fleet Street.*

1811.

PREFACE.

After having, for such a length of time, discontinued the office of Reporter, some account may be necessary why I again appear, and send the following Number of *Nisi Prius Reports* into the world, particularly when my successor has so ably performed that task. I am not resuming the office. The following number will be found, with the exception of a few cases, to commence so far back as the beginning of the year 1806, and to fill up the interval between the conclusion of my fifth volume and the period when Mr. *Campbell* commenced his Reports. In the year 1807, in consequence of a severe nervous illness, I was forced to relinquish the task of reporting; and on my recovery I found myself incapable of taking notes with that correct-

ness which was requisite to give them to the world as accurate Reports of what fell from the learned Judges by whom the points were decided. I therefore relinquished every further intention of reporting generally on my former plan. From that period I have, however, with little exception, taken Notes of Cases only in which I was myself of Counsel, and for the accuracy of which I could answer. From the collection, therefore, of three years previous to the time I have mentioned, this Number of *Nisi Prius Reports* is formed, together with those subsequent Cases in which I was personally concerned, and which accounts for the frequent recurrence of my name as Counsel in them.

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CASES

ARGUED AND RULED

AT NISI PRIUS,

IN THE

KING'S BENCH,

HILARY TERM, 46 GEORGE III.

SITTINGS AFTER TERM AT WESTMINSTER.

MEAZCAN *v.* PEARSALL.

Feb. 16, 1806.

A person carrying on a trade as a throwster only for other persons only, is liable to the penalty of the statute, for carrying on a trade without serving an apprenticeship.

THIS was an action of Debt on Statute, to recover the amount of several penalties given by Stat. 13 and 14 *Car.* II. c. 15. sect. 2. for following the trade of a silk throwster, without having served an apprenticeship.

By that Statute it is enacted:

"That no person shall, directly or indirectly, "use, exercise, continue, or set up the trade "or mystery of a silk throwster, unless such as are "or shall be apprentices to the said trade, or have

" served seven years apprenticeship thereto, under " a penalty of 40*s. per* month."

The Plaintiff in proof of his case gave in evidence, That the business of silk throwing was carried on at a manufactory of the Defendant at *Brick-lane, Spitalfields.* This fact was proved by a witness, who further stated, That *he*, the witness, conducted the business, but that the money was provided by the Defendant *Pearsall*, to whom in fact he was servant.

This was the evidence as to carrying on the trade by the Defendant, relied upon by the Plaintiff as entitling him to recover.

The same witness being cross-examined by the Defendant's Counsel, proved, that in fact Mr. *Pearsall*, the Defendant, was a mere Trustee and Executor under the will of one *West*, deceased, to whom in his life-time the business belonged, and by whom it had been carried on; and that it was, pursuant to the direction of *West*'s will, continued and carried on by *Pearsall*, for the benefit of the widow, and of a child of *West*'s, without *Pearsall*'s deriving any benefit or advantage whatever from it to himself. That the profits of the trade and manufactory itself were the object of a bill in equity, and then depending in Chancery, the Defendant here being a party as a Trustee: That the witness managed and directed the whole concern, and that he had served a seven year's apprenticeship to the business of silk throwing.

It was contended for the Plaintiff, that by the words of the act, " no person could carry on the trade

trade in any way whatever, unless he had served an apprenticeship;" and the act being, that it should not be done, "directly or indirectly," without any exception whatever; the mode of carrying on the business here suggested, could furnish no answer to the action.

For the Defendant, the case of *Raynard* v. *Chase*, 1 *Burr.* 1, was relied upon, in which it was decided; that the statute extended not to cases where the party charged as liable to the penalty, took upon himself no part of the management of the concern, but was a dormant partner only: That this case was much stronger, for here the Defendant had no interest in the business, nor derived any advantage from it whatever.

Per Lord ELLENBOROUGH. A mere Trustee who has the business cast on him, and who carries it on, not for his own benefit, but in the character of Trustee: who does not assist in the several operations, or take any part in the conduct of it, is not within the statute. There is here no beneficial carrying on of the trade, which only can by possibility subject the party to the penalty. The Plaintiff must be called.

Being pressed to reserve the point, he refused, saying, he had no doubt of the law.

Park and *Copley* for the Plaintiff.

Sir V. Gibbs and *Andrews* for the Defendant.

Feb. 17, 1806. *Doe ex dem.* PEACOCK *v.* RAFFAN.

Agreement for a demise for a year, the rent to be paid weekly, and to have a month's warning, if no default was made in payment of the rent; but which agreement the lessor afterwards refuses to execute, and the tenant pays his rent weekly. He is entitled to a month's notice to quit, though the agreement was not executed, and although, it a weekly tenant, a week's notice was good.

THIS was an action of Ejectment for a shed in Covent Garden Market.

The Defendant held it as Tenant to the Plaintiff.

The Plaintiff proved the payment of the rent, which was weekly, and then gave in evidence a week's notice to quit, and there rested his case. *Garrow*, for the Plaintiff, stating, That the notice to quit was sufficient, as it corresponded with the holding, which was weekly, as such was the reservation of the rent, and was of course evidence of the holding, and relied on a case of *Doe ex dem Parry* v. *Hazel*, 1 *Esp. N. P. C.* 94.

Lord ELLENBOROUGH assented to it—considering the notice as legal, and a reasonable notice to quit, and called on the Defendant to enter on his defence.

The defence was, That there had been an agreement between the parties for the letting of the premises. That the agreement was for a letting for a year, though with a weekly reservation of rent. That the agreement was in writing; but that after it had been engrossed, the lessor of Plaintiff refused to execute it, as it would be inconsistent with his lease from the Duke of Bedford, to whom the ground of Covent Garden belonged, and who had leased the shed to him. In this agreement the parties had agreed, That if the Defendant regularly paid his rent, he should not be put out of possession, without four weeks' notice to quit.

It

It was then contended by the Defendant's counsel, on the authority of the case *Doe ex dem Rigg* v. *Bell*, 5 Term Rep. 471, that the Defendant could not be ousted on a week's notice, but should have had the four weeks reserved under the agreement. That though the agreement was void, as the lessor had not executed it, still it was evidence of, and should govern the intention of the parties.

The agreement was made 27th August, 1800.

It was proved, That on the faith of this agreement the Defendant had laid out near 200*l.* in improving the premises, and that he had regularly paid his rent up to the 12th of December, on which day the notice to quit had been given. The demise was laid on the 20th December, being the expiration of a week from that day.

The Plaintiff's counsel replied, That the agreement, which had never been executed, could not controul the demise, which, from the reservation of the rent must be decided to be from week to week, upon which holding a sufficient notice to quit had been given.

Lord Ellenborough said, That a week's notice to quit was certainly sufficient, where the holding was weekly; but the rule of law, as to the legality of the notice, was still controulable by the actual agreement of the parties That here an answer had been given to the Plaintiff's case, which relied on the presumption; by shewing an actual agreement as to the time of notice to quit; for whether it was a weekly holding or a yearly holding, four weeks' notice was required to quit, in case there had been no de-

fault in payment of the rent, and it had been proved that there had been no defaault: the Defendant was therefore entitled to four weeks notice. As to the agreement, it was not evidence further than as shewing what were the true terms upon which the parties treated, and under which the Defendant took possession.

The Plaintiff was nonsuited.

Garrow and *Morris* for Plaintiff.
Wigley for Defendant.

Feb. 19. SLY *v.* EDGLEY.

If a person employs a tradesman to do any work for him, and in the execution of it the tradesman, or his servants, by their negligence, cause an injury to any one, the person employing is liable for the injury arising from such neglect.

THIS was an action on the case against the Defendant, charging him with having negligently and improperly left open in the public street, or highway, a certain hole, into which the Plaintiff had fallen and broke his leg.

The Plaintiff was a proprietor, with others, of several houses in Mansfield-place, Kentish-town. The kitchens being subject to be overflowed, it was agreed among the several inhabitants to sink a large sewer up the street They jointly employed a bricklayer, who opened the sewer, and he having left it open, the Plaintiff fell in and met with the accident in question.

Two points were made by the counsel for the Defendant; First, that the Defendant having been concerned with others, he could not be sued alone, but

but that the others should be joined: Secondly, that the Defendant and others having employed the bricklayer, by whose negligence the accident had been occasioned, the wrong had been done by the negligence of the bricklayer, so that the action should have been brought against him: That the bricklayer was not the servant of the Defendant, for whose acts he might be made responsible; He was employed to do a certain work, and the mode of doing it, which had caused the injury, was entirely his own act, and therefore he only should be liable.

Lord ELLENBOROUGH over-ruled both the objections. He said, It was admitted that the Defendant was the person who gave the order, though with others, and the injury had arisen from the execution of it, and he was bound to take care that in doing what was a lawful act, it should be done so as not to be injurious to the public. As to the second point, it was the rule of *respondeat Superior*, what the bricklayer did was by the Defendant's direction. That he had employed the bricklayer; it was the bricklayer's duty to have given the public, notice of the state of these works, and the danger to which they might be subjected. Though the principal was liable to the injured party, the bricklayer would be liable over for his own neglect.

The Plaintiff had a verdict.

Park and *Comyn* for the Plaintiff.

Garrow and *'Espinasse* for the Defendant.

Feb. 20. BURNLY *v.* JENNINGS.

Where an apprentice is bound for five years only and a bond given conditioned for his service; the binding being void under stat. 5, Eliz as not being for seven

THIS was an action of debt or bond. The bond recited "That the son of the Defendant had been bound as an apprentice to the Plaintiff for five years." The condition of the bond was for the service of her son, and that in case of his absconding or absence the Defendant became bound to pay the Plaintiff 40*l.* a-year for every year he should be absent.

The boy had absconded, and the action was for 40*l.* the sum reserved for one year's absence.

It was, on the part of the Defendant, relied on as a defence to this action, that the Statute 5th Eliz 31, required, That all indentures of apprenticeship should be for the term of seven years, or they were to be considered as void: that here the binding of the apprentice was stated to be for five years only, and of course was void under the Statute, and that it being void, the instrument conditioning for that service under it was void also—The Defendant had specially pleaded the Statute to that effect.

It was contended in answer, by the Plaintiff's counsel, that the indenture of apprenticeship, being a contract for the benefit of an infant, was not void, but voidable only by the infant's own dissent on attaining full age, which here had not taken place; that Settlements were constantly gained under indentures by service under such binding, which could not be the case, if they were to be considered

as

as void; and though it was contended, that the boy, by absconding, had shewn his intention to avoid the indenture; that at all events the Defendant, his mother, who was a party to the deed, had no right to avail herself of the indenture being void.

Jackson v. Warwick, 7 Term Rep. 121, was cited for Defendant, where a note, given under similar circumstances, was held to be void *.

The parties afterwards compromised, but not until Lord ELLENBOROUGH had expressed the strong inclination of his opinion; that the plea was well pleaded; and that it amounted to a legal defence †.

Garrow and *Marryat* for the Plaintiff.
Sir *Vicary Gibbs* and *Lawes* for the Defendant.

* The case cited of *Jackson* v. *Warwick*, 7 Term Rep. 121, was where a promissory note given by the father for part of the apprentice-fee of his son, it was held that the Plaintiff could not recover on it, there being no mention of any premium given, nor appropriate stamp, and of course the indenture was void by Stat. 8 Ann, ch. 9.

† As to the point of how far an infant can avoid an indenture of apprenticeship, and what acts amount to it, vide *Rex* v. *Hindringham*, 6 Term Rep 557, and *Rex* v. *Heaton Norris*, 6 Term Rep. 653.

Same Day. ***Doe ex dem.* HOLCOMB *v.* JOHNSON.**

If a tenant comes in the middle of a quarter, and afterwards pays for the time to the beginning of a succeeding regular quarter, from which time he pays half-yearly, his tenancy commences from that regular quarter day to which he paid up.

THIS was an action of Ejectment for a public-house brought by the Plaintiff as Lessor, against the Defendant as the Tenant.

The Plaintiff proved the tenancy and payment of rent at Christmas and Midsummer.

The notice given by the Landlord was to quit at Christmas.

The defence was grounded on the supposed insufficiency of this notice, as not ending with the Defendant's Term.

Defendant's case was, That he had come in under a person of the name of Cockett; That Cockett's tenancy commenced on the 21st of November; and that of course the notice to quit should have been to quit on that day.

Cockett was called, and he proved that fact, that he had so come into possession at that time, which was the half quarter; but it appeared that the rent had afterwards been paid by him from the time of his coming in up to the Christmas following, and afterwards received by the landlord from Cockett at Midsummer and Christmas.

Lord ELLENBOROUGH. The notice to quit must correspond with the commencement of the term. But if the Tenant comes in in the middle of a quarter, and he afterwards pays his rent for that half

half quarter, and continues then to pay from the commencement of a succeeding quarter, he is not a Tenant from the time of his coming in, but from the succeeding quarter day. In this case, had Cockett paid his rent on the half-year commencing from the 21st of November, that would have been a tenancy from the 21st of November, and the notice to quit should have corresponded with it. But here the rent is paid half yearly from Christmas, that must be therefore held to be the commencement of the tenancy.

Verdict for Plaintiff.

Gibbs and *Marryat* for Plaintiff.
Garrow for Defendant.

SITTINGS AFTER TERM
AT GUILDHALL.

HOLLAND, Esq. Executor of O'HARA, *v.* SMITH, Executor of KENDRICK.

March 4.

Where a policy of insurance has been effected on the life of a debtor, as a security to the lender of money, and the lender charges the premiums to the account of the debtor, who pays them, if the principal is afterwards paid, the debtor, or his representative, is entitled to the policy.

THIS was an action for money had and received.

Plea of *Non-assumpsit.*

This action was brought to recover a sum of 150*l.* under the following circumstances:—

A person of the name of *O'hara*, in his life-time had been a Captain in the Navy; the Defendant's testator,

testator, *Kendrick*, had been his agent: having become indebted to *Kendrick*, and having no security to give; *Kendrick* had effected a Policy on his life for 150 *l.* at the Pelican Insurance Office. *O'hara* died in the year 1802. The money due from *O'hara* to *Kendrick* had been paid, and *Kendrick* being then dead, and the office liable on the Policy, the Defendant was called upon by the Plaintiff, as Executor of *O'hara*, for the Policy, or the value of it.

The Defendant refused to deliver up the Policy, and relied upon his right to hold it, on the ground, that having been called upon by the Office, previous to *O'hara*'s death, to pay the premium, he had paid it, in order to preserve the Policy on the event of *O'hara*'s death taking place.

The Defendant afterwards applied for the amount of the Insurance, and it had been paid by the office. The present action was therefore brought to recover the amount of the insurance on *O'hara*'s life, so paid to Defendant.

It was contended for the Defendant, that *O'hara* never had any interest in the Policy; that it had been merely effected by *Kendrick* for his own security to cover, in the event of *O'hara*'s death, the money due to him by *O'hara*: that no interest in it could therefore pass to *O'hara*'s executor, and that he could therefore maintain no action for what never could belong to the Testator's estate.

To rebut this position the Plaintiff proved, that during the number of years the policy subsisted, which was from 1797, though *Kendrick* had paid the money

money for the premiums at the office, he had regularly charged it in account with *O'hara*, and *O'hara* had paid him.

Garrow, on these facts, put it to Lord ELLENBOROUGH for his Lordship's opinion, whether upon the evidence there could be said to be any title to the Policy, or money produced by it, in the representative of *O'hara*.

Lord ELLENBOROUGH ruled, that the premium having been paid by *O'hara*, it must be taken that he meant to keep the Policy alive for his own benefit: that whatever property he had in it devolved upon the Plaintiff, as his representative; if indeed the money due by *O'hara* to *Kendrick* had not been discharged, *Kendrick*, or his representative, would have had a right to hold the Policy for his own security, and to liquidate his own debt by its produce; but as that debt was discharged he could have no claim to the Policy; the money he had recovered on it belonged to *O'hara*, or his representative, by whom the premiums had been paid.

Verdict for the Plaintiff, deducting the premium last paid.

Sir *V. Gibbs* and *Puller* for the Plaintiff.

Garrow and *'Espinasse* for the Defendant.

March 6. FREELAND and Others *v.* GLOVER.

It is sufficient in effecting a policy of insurance for the assured to communicate to the underwriter the then state of the ship, nor is the withholding from him letters containing an account of former misfortunes which have happened to the ship or crew, a concealment of circumstances sufficient to avoid the policy.

ASSUMPSIT on a Policy of Assurance on the ship *Neptune*, from *Liverpool* to the coast of *Africa*, and during her trading on the coast.

The loss laid in the Declaration was by perils of the sea.

The Plaintiff proved the Policy, and the loss within the terms of it.

The defence was, concealment of circumstances.

The ship had sailed from *Liverpool* in December, 1799; she arrived safe on the coast of *Africa*; traded to *Calibar*, and from thence to *Gibou River*, in March, 1800. In April of the same year they arrived at *Bembia*.

In the month of December, 1799, the natives rose on them and killed the captain and wounded several of the crew: They had also been attacked by disease, so that in February, 1800, the whole of the crew, which had been twenty in number when they left England, were by death reduced to five. In February, the owners received a letter from the ship, stating the misfortune which had taken place, and the death of the crew.

In the April following, another letter was written, stating the condition of the ship, and that they had been able to ge nine men, which was the whole of the ship's crew. This letter was received in September, and the Policy in question effected on it.

But

But on effecting the Policy, the Broker had shewn the letter of April, and not that of the February preceding.

Park, for the Defendant, strongly contended that this was a concealment of circumstances, and avoided the Policy. That the underwriters were entitled to see every paper and document respecting the ship: That the Policy was underwritten at a great length of time after the ship had sailed, and that the loss of her crew would have most materially varied the risque and should have been communicated.

But, *per* Lord ELLENBOROUGH, You are not obliged to inform the Underwriters of all bye-gone calamities which the ship has suffered, nor to produce to the insurer your whole port-folio of letters. If there had been a survey at a former time of the ship, from a doubt of her sea-worthiness, would the Underwriter be intitled to be informed of that, and to consider the policy void if that was not communicated? Was the Underwriter truly informed of all the circumstances known to the assured on his latest information from the ship? If he was, it is sufficient.

The letter of the month of April gave all that information. It was shewn to the Underwriters.

Verdict for the Plaintiff.

Garrow, Gibbs and *Gasclee* for the Plaintiffs.
Park and ——— for the Defendant.

DOBBIN

DOBBIN *v.* THORNTON.

March 3.

ASSUMPSIT to recover the amount of demurrage on a bill of lading.

If a person receives goods from on board ship, which are shipped to the shipper's order or his assignees, paying freight with a certain allowance for demurrage, he makes himself by acceptance of goods liable to all the terms of the bill of lading, and of course to demurrage.

The declaration stated the bill of lading, by which one *Redmond Power* shipped on board a certain ship, called The *Mary* and *Tom*, whereof the Plaintiff was master, sixty puncheons of Irish spirits, to order or assigns, they paying freight with primage, &c. It was to be taken out in ten days after arrival, or to pay three guineas per day demurrage.

The Plaintiff proved the arrival and the entry of the ship at the Custom-house, and notice to the Defendant on the following day, and that the Defendant had suffered the spirits to remain on board for twenty-five days afterwards; when he received the whole.

Sir *V. Gibbs*, for the Defendant, objected, That the action could not be sustained; That there was no privity between the captain and the Defendant, which could entitle him to maintain the action. The Defendant's contract was with the shipper of the goods, who had sent them by the Plaintiff, and with whom only the Defendant's contract was, and to whom only he was liable.

The Plaintiff's counsel answered, That goods by the bill of lading were to be delivered to the shipper's order, or his assigns: bills of lading were transmissible from hand to hand or by indorsement, and

and the Defendant had received the goods by virtue of the bill of lading, thereby admitting that he was the Assignee of the shippers, and bound by the terms of the contract which was to pay freight, demurrage, and the other charges, to the Captain of the ship, who, from the nature of his office, was the person authorised to receive them.

Lord ELLENBOROUGH, referring to the bill of lading said, The goods are to be delivered to the order of the Shipper or his Assigns, paying freight for the same, and with other conditions, as mentioned in the bill of lading such as Primage, &c.; the terms therefore of the Defendants having the goods was, that of paying for the freight and conforming to all the other stipulations of the bill of lading. The Defendant has here taken to the goods and has received them; he is bound by all the conditions of the bill of lading and is liable to all the terms of it, one of which is the payment of demurrage to which he is clearly liable.

Verdict for the Plaintiff.

Park and *'Espinasse* for the Plaintiff.
Sir *V. Gibbs* and *Lawes* for the Defendant.

* *Vide post. Sugart* v. *Scott*, where a similar point was ruled in the Common Pleas, by Sir JAMES MANSFIELD, Chief-Justice.

March 8. WILLIAMS *v.* THOMAS, HUNTER and LATHAM.

When three persons undertake to accept bills for a particular concern, and the drawer draws bills on account of one of them only, & not for the particular concern, & he accepts in the name of the three, such bill cannot be recovered by a *bonâ fide* holder who received it from the drawer, against the other two.

THIS was an action of *Assumpsit* by the Plaintiff, as payee of a bill of exchange, drawn by certain persons trading under the firm of *Leake* and *List*, on the Defendants for 1500*l.*, for goods furnished to the ship *Cecilia*; on which bill the Defendants were charged as acceptors.

The Defence was, That the Defendants were not partners, and the acceptance was by *Latham* on his own account, and so that the other Defendants were not liable.

The Defendant, *Thomas*, was Captain of the ship *Cecilia*, and having occasion for different articles of out-fit on account of the ship, the three Defendants had given an undertaking to *Leake* and *List*, to secure to them the money advanced on that account.

It was then stated by his Counsel, That though such had been the extent of the engagement, *Leake* and *List* had drawn bills on other accounts, and to accommodate *Latham* alone, one of which was the bill in question.

Lord ELLENBOROUGH intimating an opinion that this was an answer to the action, as one Partner could not bind another for his sole engagement; the Counsel for the Plaintiff said that they were prepared to shew, that whatever might be the private

vate understanding between the three Defendants, and *Leake* and *List*, as to restricting the drawing of the bills to a particular concern, that they had accepted bills on other accounts, and appeared as general Partners to the world. That the Plaintiff took the bill under such impression, ignorant of any severance of interest in the parties, and was entitled to recover, having *bonâ fide* taken the bill as a partnership concern.

But, *per* Lord ELLENBOROUGH, *Leake* and *List* could give no better title to the holder of the bill than they had themselves: they could not draw for a general account, but for account of the ship only: they could not bind *Thomas* by drawing a bill upon him, and the other Defendants for an account unconnected with the ship. If the Plaintiff had taken the trouble to enquire, he might have heard the real state of the parties. He has not done so, and must therefore take the bill under the same terms, and liable to all the objections to which it was subject, as issued by *Leake* and *List* without authority.

Plaintiff nonsuited.

Garrow and *'Espinasse* for the Plaintiffs.
Sir *V. Gibbs* and *Park* for the Defendant.

IN THE COMMON PLEAS.

SITTINGS AFTER TERM AT GUILDHALL.

LIKE *v.* HOWE and ROGERS.

If a trader, against whom a commission of bankrupt has issued, has acquiesced in so far as to go to the different creditors, to solicit them to vote for particular persons as assignees, he cannot afterwards question the commission in an action for money had or received, against those persons, whether he is an object of the bankrupt laws or not.

THIS was an action of *Assumpsit* for money had and received by the Defendants.

Plea of *Non-assumpsit* by each.

The object of this action was, To try the validity of a commission of bankrupt which had been issued against the Plaintiff, under which the Defendants had been chosen Assignees; and in that character had received the money in question, as part of the Bankrupt's estate.

The point meant to be contended and relied on for the Plaintiff was, That he was not a Trader nor an object of the bankrupt laws; for that in fact the only dealing in which he had ever been concerned, bearing the colour of a trade, was his having purchased a few lots of old materials of a house, which had been pulled down, and which he had worked up in the repairs of some houses which belonged to himself.

The

The Commission had issued in 1802, the Plaintiff had surrendered under it; but in August, 1805, had petitioned the Chancellor to supersede it.

This petition the Chancellor had dismissed with costs.

The Defendants, independent of the general ground of defence, That in fact the Plaintiff was an object of the bankrupt laws; relied upon another and collateral matter as conclusive on the Plaintiff. That after such a length of time elapsed from the suing out of the commission, and he having acquiesced in it, it should not be permitted to him to contest the validity of it: That though the mere surrender under a commission could not be construed into an acquiescence of its validity, here was a positive acquiescence on the part of the bankrupt; he having, after his commission had been opened, gone round to his several Creditors and solicited them to vote for the Defendants on the choice of Assignees, as being honest and respectable men.

Lord Chief-Justice Sir J. MANSFIELD ruled, That if it could be proved that the Plaintiff had done so, had solicited the creditors to vote for the Defendants to be his Assignees, by which means they were enabled to obtain the money, the produce of his estate in the character of Assignees, that he could not support an action to recover the money so recovered.

The Defendant proved the fact, and the Plaintiff was nonsuited.

Cockell and *Onslow*, Serjts. and *'Espinassse* for the Plaintiff.

Shepherd and *Best*, Serjts. and *Morris* for the Defendant.

Vide Flower v. *Heeber*, 2 *Vez.* 236; in which case the Lord Chancellor granted an Injunction against an action brought by a Bankrupt under similar circumstances.

Feb. 26, 1806.

SECGART *v.* SCOTT and Other.

If goods consigned from abroad, are delivered to a person who in fact is not the Consignee, if he accepts the goods, he is liable for the Freight.

THIS was an action of *Assumpsit* brought to recover the freight of a quantity of corn.

The Plaintiff was Captain of a Prussian vessel called the *Aurora*. He proved that a quantity of corn had been shipped on board his vessel at *Rostock*, in *Germany*, and that he had carried it to *England*, and delivered it to the Defendants, *Scott* and *Co.*; from whom he now sought to recover the freight.

The defence was, That the corn in question, had been shipped from *Germany*, and consigned to the house of *Sayers*, of *Lynn Regis*: That the Plaintiff, in place of delivering it pursuant to his bill of lading at *Lynn*, had carried it to *London* and delivered it to the Defendants.

Upon

Upon this evidence, it was contended by *Best* Serjt. Counsel for the Defendants, That the action could not be supported: That the action for freight could only be supported against the Consignees of the cargo, or on an actual promise to pay by those who received it: That here *Sayers*, of *Lynn*, were the actual Consignees of the cargo; and had in fact claimed it from the Defendants.

Per Sir J. MANSFIELD, Chief Justice. What if a party takes to the goods, though they are not consigned to him, and keeps them; shall he not pay freight? I think the acceptance of the corn carries with it a claim for the freight; and if the party accepts of it, though delivered by mistake, it shall not be for him to say that the delivery was wrong: If *Sayers* had taken possession of the corn in *London*, though consigned to them at *Lynn*, would they not have been liable? It is the delivery and acceptance that constitutes the liability. I am of opinion the Plaintiff is liable.

Verdict for the Plaintiff.

Shepherd and *Bailey*, Serjts. and *Gaselee* for the Plaintiff.

Best, Serjt. for the Defendant.

* *Vide ante* Dobbin v. Thornton, page 18.

March, 2.

DAWSON *v.* REMNANT.

Where parties having cross-demands, settle and balance their accounts, though part of the Plaintiff's demand was for which no action could be supported, the settlement of the accounts shall bind the Defendant, so that he annot set up that defence to an action for the balance.

THIS was an action of *Assumpsit* for goods sold and delivered, and an account stated.

Plea of *Non-assumpsit*, with notice of sett-off.

The Plaintiff was the keeper of a tavern in the City of *London*, and the action was brought to recover the amount of a tavern bill, and for liquors sold and delivered. The bill was for liquors furnished to the Defendant in the Plaintiff's house, and wine and other liquors sent to him at his own.

The sum claimed by the Plaintiff was 8*l*. 15*s*. as the balance of the account.

The Defendant, in order to reduce the demand within *5l*., which would bring the case within the *London* Court of Conscience Act, and so subject the Plaintiff to the payment of costs, proposed to go into evidence to shew, that great part of the bill was for spirituous liquors delivered at different times, in quantities less than the value of 20*s*. at a time, and which, under Stat. *Geo*. II. could not be recovered; and, by striking off those *items*, the debt due to the Plaintiff would be reduced to less than *5l*.

In answer to this the Plaintiff proved, That the Defendant, who was a plumber, having done work for him, they had come to a settlement of their accounts; That part of the Plaintiff's demand was composed of the *items* which the Defendant now proposed to dispute; That no objection was then made, and the balance in question was struck at the foot

foot of that account, so including those *items*, of 8*l*. 15*s*. for which Defendant agreed to accept a bill:— This evidence was contended by the Plaintiff's Counsel to be conclusive on the Defendant; he, by such settlement, admitting the balance to be due upon a statement of accounts, in which the Plaintiff claimed, and he allowed the *items* now disputed: That upon that settlement the Defendant by claiming credit for his bill paid so much of it, which must be taken as a payment generally, and of course applying indiscriminately to every part of the Plaintiff's demand; for where the payer of money made no appropriation of it, the receiver might. The Plaintiff, therefore, had a right so to apply the amount of the Defendant's bill, and the latter could not now give another appropriation to it.

It was answered by *Best*, Serjt. for the Defendant, That if this counter-demand, which was the object of set-off, was to be taken as payment, it could only be taken to be of a demand which could be legally enforced, not of a demand contrary to law, such as the present, for spirituous liquors so furnished: The Defendant had a right to say that he had paid so much of the Plaintiff's demand as was a legal debt by his set-off, and was at liberty to contest the remainder, part of which was the sum paid for the liquors.

Per Sir J. MANSFIELD, C. J. A set-off is in the nature of a payment. Had the Defendant paid money on account of this demand, could he have recovered it back again? No; it would be a payment of a demand, which by law, perhaps, could not

not be enforced; but which he having paid through a motive of honesty, the law will not allow it to be recovered back. The Defendant, when he settled this account, made no objection to the demand for the liquors; he made a payment by his set-off, on the settlement of the account generally; he made no discrimination, nor did he desire that his demand should be a set-off against any particular part of the Plaintiff's; if the payer of money makes no appropriation of it, nor directs it to be placed to any particular account, the receiver of it may. I think the settlement of the account conclusive, and the Plaintiff entitled to recover; but will I save the point.

The Plaintiff had a Verdict for 8*l.* 15*s.*; and I believe the point was never moved *.

Bailey, Serjt. and *'Espinasse* for the Plaintiff.

Best, Serjt. for the Defendant.

* *Sittings at Westminster, before Michaelmas Term*, 1798, *before Lord Kenyon.*

FULHAM *v.* DOWN.

In this action, which was to recover money back which had been paid on an illegal consideration,

Lord KENYON said, That where a voluntary payment was made of an illegal demand, the party knowing the demand to be illegal, without an immediate and urgent necessity, (or as expressed by Mr. *Bearcroft*, unless to redeem, or preserve your person or goods,) it is not the subject of an action for money had and received. The law, if so held, would subject all accounts and settlements between parties to revision.

TAYLOR *v.* M'VICCAR. *March*, 1, 1806.

Depositions taken in an action on a policy of insurance of the Captain, who is also part Owner, where the loss is imputed to his misconduct, are not evidence.

THIS was an action on a Policy of Insurance on goods, on a voyage from *Liverpool* to *Waterford;* the loss was stated to be by perils of the seas:—the loss was proved; but the defence set up was, that the Captain had deviated from the voyage by going into a port in *Wales*, where the loss had happened.

The Plaintiff, after calling two witnesses, from whose cross-examination the defence set up was disclosed, proposed to read the Depositions of the Captain, who was also a part owner of the ship: and which Depositions, he being abroad, had been regularly taken under an order made in a previous stage of the cause.

The Defendant objected to their being read, on the ground that the Captain, both in his capacity of Captain and part owner, was interested in having a verdict found for the Plaintiff, inasmuch as if the Plaintiff failed in recovering the amount from the Underwriter (the Defendant) on account of a deviation, he might have an action against him as Captain, for his misconduct in being guilty of such deviation, whereby the Plaintiff had been prevented from recovering the amount of the Policy from the Underwriters; and in which action, not only the value of the goods, but also the costs incurred in the action against the Underwriters might be recovered.

The

The effect therefore of this testimony would be to save himself from an action proceeding from his own misconduct; and further, if the Plaintiff recovered against the Underwriters, it would be a bar to his recovering from him as owner or captain; at least to the extent of what he should get from the Underwriters, and therefore exonerated him as owner or captain from so much.

It was contended, on the part of the Plaintiff, That the verdict in this action, in whichever way it was, could not be given in evidence for or against the captain or owner in any action to be brought against him, and that that was the only criterion by which it was to be decided whether a witness was interested or not.

MANSFIELD, Chief Justice—decided, That the Depositions could not be read, as the person both in his capacity of part owner and Captain, was interested.

He said, the verdict would not be evidence of the fact of the deviation, or misconduct of the Witness, but it would be evidence of certain expences incurred by the Plaintiff, in an action on the Policy, and the costs he was obliged to pay, in consequence of his failure in such action, which failure had arisen from the misconduct of the Witness himself.

Shepherd and *Best*, Serjts. and *Taddy* for the Plaintiff.

Cockell and *Bailey*, Serjts. and *Littledale* for the Defendant.

HODGSON v. WILLIAMS.

March, 7.

When the father of a bastard child, upon whom an order of filiation had been made, paid several sums on that account to the Parish, and having all that time for which he paid, the child was in the Foundling Hospital, and the Parish put to no expence, he may recover it back.

THIS was an action of *Assumpsit* for money had and received with the usual money-counts.

Plea of *Non-Assumpsit*.

The action was brought to recover the sum of 37*l.* paid to the Defendant, who had been Overseer of the Poor for the parish of *St. Peter, Cornhill*, for the years 1804 and 1805, by the Plaintiff, under the following circumstances:—

The Plaintiff had been charged as the putative father of a bastard child; an order of maintenance had been made on him to pay four shillings weekly, for the support and maintenance of the child, &c. &c. In pursuance of this order, he had paid, in the years 1804 and 1805, to the Defendant, as Overseer of the Poor, two sums of 20*l.* and 17*l.*

During the period of these two years, he had several times applied to the Defendant respecting the child, and was refused any information on the subject. He was told that he had nothing to do with it; that he must pay the money under the order, or he would be sued for it. In consequence of such threat, he had paid the two sums in question. It was afterwards discovered, that the child before those times had been admitted into the Foundling Hospital, where it was brought up and supported ever since.

Upon

Upon this evidence, the Plaintiff's counsel, under the authority of the cases of *Cole* v. *Gower*, 6 *East*. 110, and *Wild* and *Griffin*, 5 *'Esp.* N. P. C. 142, relied upon their right to recover: That it having been decided in those cases, that securities given to indemnify a parish, could not be carried further than as mere indemnities, and so far only were to be taken as available. Upon the same principle, if, through mistake or from coercion, the putative father had paid a sum exceeding that which was a fair indemnity, he had a right to recover it back; that, they contended was the case here: the Plaintiff was threatened with proceedings under the order of filiation, and supposing the child to be living and in the care of the parish, had paid the money under the joint influence of coercion and mistake.

Shepherd, Serjt. for the Defendant, contended, That whatever might be the principle as to the Plaintiff's liability, this money could not be recovered back, having been voluntarily paid. If the Plaintiff could have defended himself against the demand, which, under the authority of the cases cited, he could have done with effect, and he notwithstanding had paid the money, it must be deemed a voluntary payment; he cited *Marriot v. Hampton*, 7 T. Reps. 264, and *Brown v. M'Innally*, *Esp.* N. P. C. 279, as establishing that Doctrine.

Sir J. MANSFIELD, C J. A man cannot be said to pay money voluntarily, who pays it under the influence of a threat; but putting that out of the question, must not a man who is said to pay money

money voluntarily, have a full knowledge of all the circumstances under which the demand is made? If circumstances are concealed, which if disclosed would alter the case, and those circumstances are only within the knowledge of him to whom the money is paid, the payment so made is not fairly made but by mistake, and mistake is a ground of assumpsit: here the facts of the provision made for this child by the Foundling Hospital was concealed from the father; the Parish were put to no expence, then upon what principle can the money be withheld? The cases cited establish the principle and the Plaintiff's right to recover.

The Plaintiff had a verdict.

Best, Serjt. and *Lawes* for the Plaintiff.
Shepherd, Serjt. for the Defendant.

END OF HILARY TERM.

CASES

CASES

ARGUED AND RULED

AT NISI PRIUS,

ON THE

HOME CIRCUIT.

CHELMSFORD LENT ASSIZES, 1806.

Coram HEATH, JUSTICE.

March, 1806.

MANN *v.* BARRETT.

If the daughter of a person performs all the duties of a servant, and all domestic office in her father's house, though she does not actually sleep in the house, is seduced, the father may support an action, *per quod servitium amisit.*

TRESPASS by the Plaintiff for debauching his daughter and getting her with child.

The declaration was in the common form, *per quod servitium amisit.*

It appeared in evidence, That the Plaintiff lived at a short distance from his son who occupied an adjoining farm; the Plaintiff's daughter (the young woman who had been seduced) had gone to live with

with her brother to manage his house; but her father's being at a short distance, she continued to go back and forwards to her father's, who kept no servant, where she did all the household business as before, but she slept at the brother's house. She never went to her father's, but to assist in the household affairs of his family.

It was objected by *Best*, Serjt. That the action was not maintainable; the nature of her service not being of the description which the law required to entitle the father to support the action: that, to support the action, she should be inhabiting in the house, and part of her father's family at the time of her seduction; that if by temporary or occasional domestic acts in the house of a father, the action could be supported, every woman out at service by a visit or occasional domestic act at her father's house, if seduced, could give her father a right of action, which could not be.

It was answered by the Plaintiff's counsel, That the grievance was the loss of service in consequence of the seduction, which appeared had been the case here. That it was proved she was in fact the only servant her father had, acting in every respect as a menial servant, by doing all the domestic offices of the house, such as are usually performed by a servant; that the place where she actually slept made no difference, nor the rendering of similar services to her brother, if in fact she did all the indoor work, and performed the office of a menial servant within her father's house. He was deprived of those services by the act of the Defendant, who was therefore liable to the action.

Mr. Justice HEATH, who tried the cause, was of opinion, That the nature of her service was such as to entitle the Plaintiff to support the action, and so directed the jury; giving the Defendant leave to move to set the verdict aside.

Verdict for the Plaintiff.

It was not afterwards moved.

Garrow and *'Espinasse* for the Plaintiff.

Best, Serjt. and *Lawes* for the Defendant.

HORSHAM LENT ASSIZES, 1806.

Coram LORD CHIEF BARON MACDONALD.

March, 26.

PAULI, Administrator of SUTTON, *v.* BROWN.

In an action by an Executor, or Administrator, for a debt due to the Intestate, a Creditor of the Intestate is a good witness to prove it.

TROVER, for a quantity of household furniture claimed by the Plaintiff, as having belonged to the intestate.

To prove property in part of the articles claimed, a witness was called. He was asked on his *voire dire*, if he was not a creditor of the intestate? and it being answered that he was, *Garrow* objected to his competency, on the ground that he was coming to increase the estate of the intestate, which was the

the fund out of which his debt was to be paid. He instanced the case of a commission of Bankruptcy, in which in an action by the Assignees of a Bankrupt, a Creditor cannot be admitted as a witness, to prove property belonging to the bankrupt estate.

It was answered by *Shepherd*, Serjt. That there was no difference in this case, and that wherein the Intestate himself was plaintiff, in which latter case it was very clear, there could be no objection, to a man to whom he owed money, and who so was his creditor being called as a witness. The right of the representative was the same: That the case of bankruptcy differed, for there there was a presumed insolvency, so that the witness bettered his situation, and the effect of his evidence was to increase the fund from whence the payment of his debt was to be made; That a Creditor, under a Bankruptcy, was entitled to a certain share of the sum recovered, which, under an administration, he might not have, as his share of the money recovered might depend on there being no other debts of a higher nature, or the preference of the administrator; besides too, he might be deemed a party, as the Bankrupt's property was by the choice of all the creditors conferred on the Assignees, and they brought action only with the consent of all the other creditors, so that they thereby became as parties.

MACDONALD, Chief Baron, ruled, That the witness was admissible. It was not distinguishable in principle, from the case put of an action of the party himself. The administrator represented the Testatrix herself, and it never was heard of, that a

person being a creditor to a party, made him objectionable as a witness, and yet the effect of his testimony was to increase his debtors ability to pay; such interest was too remote.

In the case of bankruptcy, all the property of the bankrupt belonged to the creditors, though nominally by operation of law vested in the assignees. A creditor therefore came to give evidence for himself.—The witness was admitted.

Verdict for the Plaintiff.

Shepherd and *Marryat* for the Plaintiff.
Garrow for the Defendant.

MAIDSTONE LENT ASSIZES, 1806.

Coram HEATH, JUSTICE.

Mar. 23, 1806.

STILL *v.* WALLS and HARRIS.

Where a person is convicted, under Stat. Geo. 3. c. 80, and a Warrant issued to levy the penalty on his goods, the Magistrate may order him verbally to be kept in custody, until a return is made on the Warrant.

THIS was an action of Assault and false Imprisonment against the two Defendants.

The Defendant *Walls* was the Headborough of the parish of *Cowden* in *Kent*. The Defendant, *Harris*, was game-keeper to the lord of the manor.

The Plaintiff proved, That he had been taken into custody, and after having been brought before a Magistrate, on a charge of having used engines for the destruction of the game on a Sunday, he

he had been kept in custody of both the Defendants until the next day.

The defence was, That the Plaintiff having been informed against, by an information laid before a Mr. *Allnut*, a Justice of peace for the county of *Kent*, had been summoned to appear before him upon that charge: That the information was proceeded on, and the Plaintiff convicted in the penalty of 10*l.*, for having used engines for the destruction of the game on a Sunday: That being unable to pay the penalty when convicted, the Justice had issued his warrant to levy the Penalty, and in the mean time verbally ordered the Defendants to keep him in custody until the return of the warrant to levy: and the imprisonment complained of, was the detention during that time, which was from about three o'clock on the Monday, until eleven the next day (Tuesday), when nothing being found on which to levy under the warrant, he was discharged on payment of 5*l.* part of the penalty.

To support this defence, the Defendant's Counsel relied upon the Statute 13 Geo. 3. ch. 80, § 4; by which it is enacted, "That the penalties for the first and second offence against the statute, (which is the same act in question, upon which the conviction had been made); and also for a third offence, upon a conviction at the sessions, together with the costs to be ascertained by the justices, before whom the offender shall be convicted, shall be forthwith paid by the person convicted; one moiety to the informer, and the other moiety to the poor of the parish; and in case such person shall

refuse or neglect to pay the same, or to give security for the payment thereof, such justice shall by a warrant, cause the same to be levied by distress and sale, together with all costs attending such distress, returning the overplus if any to the owner. And it shall be lawful for such justice, to order such offender to be detained in safe custody, until return may be conveniently made to such warrant of distress, unless the party convicted give security to the satisfaction of the Justice or Justices, for his appearance on such day as shall be appointed for the return of the warrant, not exceeding seven days from the time of taking such security." The statute then gives the Justices a power to commit for three months, in case of nonpayment or failure of any of the penalties.

The Plaintiff's counsel contended, That though the statute, if pursued, would have afforded a justification to the Defendants; that the method in which the Magistrate and the Defendants had here conducted themselves, was contrary to law; That the Magistrate had given, and the Defendants acted, under a verbal order only, a mode of proceeding perfectly illegal; That the law recognized no committal, nor any restraint of the person, (except in a few excepted cases: such as an arrest for a breach of the peace or felony,) without an authority or warrant in writing. That no action could be brought against a constable, without a demand in writing of his warrant; the gaolers were bound to deliver a copy of all committals when required; but that would be vain, if by a verbal order of the

Magistrate

Magistrate a man was to be deprived of his liberty, and the cause of his detention unascertained.

The Defendant's Counsel in reply, relied on the words of the act, "That it should be lawful for the justice to order such offender to be detained," which they contended meant a verbal as well as a written order.

HEATH, Justice, was of opinion, That every order of committal under the statute must be in writing, and an order by parol was insufficient, and directed a verdict for the Plaintiff.

Garrow and *'Espinasse* for the Plaintiff.
Bailey Serjt. and *Taddy* for Defendant.

In the next Term it was moved to set this verdict aside and a rule granted, which was afterwards made absolute; the Court being of opinion that a verbal order was sufficient under the statute.

Vide Still v. *Walls*, S. C. 7 *East*, 533.

KINGSTON LENT ASSIZES, 1806.

Coram HEATH, JUSTICE.

Mar. 26, 1806.

TOMS *v.* POWELL.

If a Defendant, being sued, pays the Plaintiff, after the writ is sued out, the money without discharging the costs, the Attorney may proceed in the cause notwithstanding.

ASSUMPSIT for goods sold.

Plea of *Non-Assumpsit.*

The Plaintiff sued out a writ on the 22d of June, 1805, an *alias* on the 25th, and a *pluries* on the 6th of July; but not being able to serve the Defendant he was forced to sue out another *pluries*, the last of which he served on the 26th of August; but the Defendant had paid the debt to the Plaintiff subsequent to the suing out of the first writ, but before the service of the *alias*.

Shepherd, in opening the case, stated it as the clear law, that if, after action brought, the Defendant pays the money to the Plaintiff, without knowledge of the attorney, and without discharging the costs, the Plaintiff had a right to proceed.

Mr. Justice HEATH assented, saying, that as costs were then incurred, the Plaintiff had a right to proceed for the costs.

Shepherd and *Lawes* for the Plaintiff.
Bowen for the Defendant.

CASES

ARGUED AND RULED

AT NISI PRIUS,

IN

EASTER TERM, 46 GEO. III.

LAST SITTING IN TERM

AT WESTMINSTER.

PARKER *v.* GORDON.

ASSUMPSIT by the Plaintiff as Indorsee to recover from the Defendant, as Drawer, the amount of a Bill of exchange.

If a Bill is accepted, the Person taking the Bill does it under all the terms of acceptance; and therefore if made payable at a banker's, it must be demanded within banking-hours.

The Bill had been regularly accepted, and the Acceptor, when he accepted it, had made it payable at his Banker's. The Bill had been sent to the Banker's on the day it became due; but payment had not been demanded at the Banker's until after banking hours,

hours, (five o'clock), and of course was not paid. Notice of the non-payment was given by letter to the Defendant, the drawer; and upon these facts the Plaintiff grounded his right to recover.

Lord ELLENBOROUGH said, he thought this insufficient to entitle the Plaintiff to recover against the Defendant, the drawer. The holder of a bill had, by law, a right to resort to the drawer only on the default of the acceptor; and when he took an accepted bill he took it on the terms of the acceptance. He was therefore bound to shew an attempt to procure the money from the acceptor, and that gave him a right to resort to the drawer. What has been done here? the bill was made payable at a banker's. Every bill must be demanded at a proper time and season, or the non-payment cannot be called a default. It is well known at what hours bankers pay. It would break into the whole course of business, and be a trap for the drawer of a bill, to call this a default by the acceptor.

Marryat, for the Defendant, contended, that the demand, which was made soon after five o'clock, was a sufficient demand to entitle the holder to call on the Defendant, the drawer: that the Court would not take notice of bankers' hours; and cited *Leftly* v. *Mills*, 4 Term Rep. 173; and that, in a common case, this demand would be sufficient: for no man had a right to say, he would pay only until a particular hour; if so, there was a default of payment by the acceptor, which gave the holder a right to resort to the drawer.

Lord ELLENBOROUGH said, that when a party took

took a bill with an acceptance at a banker's, the mode of payment was incorporated with the acceptance itself. He was bound, therefore, to demand payment according to the terms of acceptance, which he had not done here, and therefore could not recover.

Plaintiff nonsuited.

Marryat for the Plaintiff.
Garrow for the Defendant.

A new trial was moved for in this case; but the Court concurred in opinion with the Lord Chief-Justice.

Vide 7 *East*, 385. S. C.

SITTINGS AFTER TERM
AT GUILDHALL.

Bosanquet *v.* Anderson.

Assumpsit by the Plaintiff as Indorsee of a Bill of exchange, drawn by *Wilson* in his own favor on the Defendant, who accepted it, and indorsed over by *Wilson*.

In an action by the Indorsee of a Bill of Exchange, where several Indorsements have taken place, which are laid in the Declaration, though necessary to be proved in general; yet if Defendant applies for time to the holder, and offers terms, it is an admission of the holder's title, and a waver of proof of all the indorsements, except the first.

The declaration stated several indorsements on the Bill.

The

The evidence for the Plaintiff was only proof of the hand-writing of the first indorser; and that the Defendant, when the bill became due, came to the Plaintiffs, who were Bankers, and then holders of the bill, and offered another bill in the place of it, he being then unable to take it up.

It was contended for the Defendant, That it was necessary for the Plaintiff to prove all the indorsements on the bill stated in the declaration, for that by the averments so made, he had bound himself to prove them; though if he had not done so, and declared only on the first indorsement, he might have recovered on that only.

It was answered, by the Plaintiff's counsel, That it was sufficient for the Plaintiff to prove the hand writing of the first indorser under the circumstances above stated, that of his offering terms to the Plaintiff, and thereby admitting the bill to be his; and that there was no necessity for proving the hand-writing of all the indorsers, though so laid in the declaration, as by such admission and offer he admitted the Plaintiff's title to the bill, and thereby waived the necessity of such proof as would be otherwise necessary.

Lord ELLENBOROUGH said, That the acceptor, by his acceptance, admitted the hand-writing of his correspondent, the drawer; but if payable to the Drawer's own order, his hand-writing, as such indorser, must in every case be proved, as that put the bill into circulation; and though he accepted the bill with many names on it, if they were laid in the declaration, they should be proved: but he was of opinion that

that the offer here made by the acceptor to pay the bill to the Plaintiffs who then held the bill with all the names on it, was a sufficient admission of the Plaintiff's title, which was derived through the several indorsements, and of Defendant's liability, so as to supersede the necessity of proof of each person's hand-writing.

Verdict for Plaintiff.

Park and *Bosanquet* for the Plaintiff.
Sir *V. Gibbs* for the Defendant.

SITTINGS AFTER TERM
AT WESTMINSTER.

CHALIE *v.* DUKE OF YORK. *May 24.*

ASSUMPSIT for goods sold and delivered with the usual counts.

The mere act of striking a balance, for goods sold, of an account between two parties, does not entitle the party, in whose favor the balance is, to interest from that time, unless the money then was to be paid.

The action was brought to recover the price of wine sold by Plaintiff to the Defendant.

The Plaintiff's counsel offered to give in evidence, That in the year 1800 an account had been settled between the parties, and a balance struck in favor of the Plaintiff. On that settlement of the balance his counsel contended, That he was entitled to interest on the account so settled from the year 1800, and it was said to have been so decided in a case from *Wilson*'s Reports.

Lord

Lord ELLENBOROUGH ruled, That where the action was for goods sold and delivered; the mere settling the balance did not entitle the party to interest from that time; nor was he so entitled unless a time was fixed for the payment of the money, from which time only, interest could be claimed.

Verdict for the Plaintiff, but without interest.

C. Warren for Plaintiff.
——— for Defendant.

Vide Gordon v. *Swan*, 12 *East*, 419.

IN THE COMMON PLEAS.

SITTINGS AFTER TERM

AT GUILDHALL.

June 1, 1806.

HOLLAND v. PHILLIPS.

What is a legal tender.

THIS was an action of *Assumpsit* for goods sold and delivered with the usual money counts.

Plea of *Non-Assumpsit* as to all the money claimed, except as to 17 *l.* and as to that a plea of Tender.

The evidence of the tender was, That the Plaintiff and Defendant being together, and high words having taken place on the subject of their mutual demands,

demands, the Defendant said to the Plaintiff, there is the balance of the account; at the same time throwing down some money and several Bank-notes on the table, but they were not then counted; Holland, the Plaintiff, might have taken them up and counted them, but he refused to take them, and turned about and went away. After he was gone the Defendant desired the witness to count the money on the table, which he did, and the notes consisted of a 10*l.* note, a 5*l.* note, a 1*l.* note, and a guinea.

Sir J. MANSFIELD, Ch. J. ruled the tender to be sufficient.

Verdict for the Defendant.

Shepherd and *Vaughan*, Serjts. and *'Espinasse* for the Plaintiff.

Best, Serjt. and *Knapp* for the Defendant.

J... ..., 1806

JOHNSON *v.* WARD.

An affidavit of an Agent cannot be used to prove a fact against his principal, where he can himself be called; but where the principal has used an affidavit of the Agent in an application to the Court, in which a particular fact is stated, the affidavit of the Agent may be used as evidence of that fact.

ASSUMPSIT on a Policy of Assurance on the ship *Elizabeth*, from *London* to *Tonningen*, on the *Elbe*.

Plea of *Non-Assumpsit*.

The Policy was produced, and appeared to be signed by one *Dewar*, on account of *Ward*, the Defendant, as is the usual mode of signing Policies in *Lloyd*'s Coffee-house.

The Plaintiff failed in proving by the witness, who

who proved the subscription to the Policy, that *Dewar* was the agent of, or authorized by the Defendant to subscribe Policies in his name.

The Defendant had, however, moved to put off the trial of this cause on an affidavit made by *Dewar*; and in that affidavit he swore, That he had subscribed the policy in question for, and on account of *Ward*, the Defendant.

It was objected by the Defendant's Counsel, That this could not be received as evidence against *Ward*, as it was making the declaration of the agent to a particular fact, evidence against the principal, which was not legal evidence, as he might be called himself.

CHAMBRE, Justice, said, He thought, under the particular circumstances of the case, it was admissible evidence; and that he should receive it; on the ground of its having been produced and offered to the court by the Defendant himself, in an application to it, as a fact to determine their judgment on a matter arising in the course of the cause, which application the Defendant has made for his benefit: a mere affidavit of the agent, would not be evidence if not so used; but when produced by the Defendant himself, and used by him for the purpose of moving to put off the trial, he must be presumed to know and adopt its contents.

It was accordingly admitted.

A Copy from the Custom House, of the Searcher's Report of the Cargo, kept there, is Evidence.

To prove the property on board, consisting of three casks of indigo, the Plaintiff called a witness, who was a clerk in the Custom-house, which contained an account of the ship's cargo. It was explained

plained by the officer to be a Paper, which is made under the direction of the Statute, 12 Car. 2. and is a copy of the official paper, which contains an account of the cargo, which has been examined by the Searcher: the official papers go with the ship, and the paper produced is kept at the Custom-house.

It was objected by the Defendant's counsel, That this was not evidence; upon this ground, That either the Captain should be called to prove the goods actually on board, or the Searcher who actually searched the ship, and found and reported such goods on board, and upon whose report the Paper in question was made out. It was not therefore the best evidence: besides which the witness had not copied the paper himself.

CHAMBRE, Justice, ruled it to be admissible as a paper made by authority of an Act of Parliament by an officer of the Customs appointed for the purpose, and lodged there as an official document of the ship's cargo.

Shepherd and ——— for the Plaintiff.
Best, Serjt. for Defendant.

END OF EASTER TERM.

CASES

ARGUED AND RULED

AT NISI PRIUS,

IN

TRINITY TERM, 46 GEO. III.

SECOND SITTINGS IN TERM

AT GUILDHALL.

COULSON *v.* JONES.

Whenever a General Issue is pleaded, though with a Tender in the Plea, or with different Pleas, Defendant having given notice of Set-off; may give evidence accordingly.

ASSUMPSIT for goods sold and delivered.

Plea of *Non-Assumpsit* as to all the money claimed by the Declaration, except as to 6 *l.* 19 *s.* and as to that a Tender. The Plaintiff also had given notice of Set-off.

The Tender was admitted, and the Plaintiff went further damages.

The

The Plaintiff proved his demand, which exceeded the sum tendered, so that a balance appeared to be due to him. This the Defendant proposed to cover by his Set-off; and for that purpose was proceeding to prove the articles composing it, when it was objected by the Plaintiff's Counsel, That such evidence was inadmissible; That the Defendant could only give notice of Set-off, when there was the single Plea on the record of the General Issue; and that here being a special Plea of Tender, evidence of Set-off was inadmissible, for that if he had intended to avail himself of it, he should have pleaded it as a distinct Plea, which was the usual course of practice.

It was answered, That there was no double Plea on the Record. It was *Non-assumpsit* except as to part, and a Tender as to that part, which was a single Plea only: but that under every circumstance of a General Issue pleaded, whether as a single Plea or otherwise, the Defendant could give notice, and go into evidence of Set-off.

Lord ELLENBOROUH referred to the words of the Statute, 2 Geo. 2. ch. 12. which are—"That "where there are mutual debts between the Plain- "tiff and Defendant, or if either party sue or are "sued as Executors or Administrators, and where "there are mutual debts between the Testator or "Intestate and the other Party, that one debt may "be set-off against the other, and such matter given "in evidence under such general issue, or pleaded "in bar; but if intended to be given in evidence "under the general issue, notice must be given of

" the particular sum intended to be Set-off, and on " what account it had become due ;"

Having so referred to the Statute, he said he was of opinion, that the evidence was admissible; and that in every case of a General Issue pleaded, and notice given of it, a Set-off could be given in evidence. There were no restrictive words in the Statute, confining it to a single Plea of the General Issue: That though the common mode of pleading was to plead a Set-off when there was another special plea on the Record; it rather appeared that it was done as a matter of convenience to save the trouble of delivering and proving a notice of Set-off, which a plea saved; and where a Rule to plead several matters was necessary, convenience it pointed out as a matter desirable to add the Plea of Set-off, in place of giving notice of Set-off, as both might be included in the same Rule: there therefore appeared to him no legal objection whatever to the admission, and that the Statute appeared to him to warrant it, and he admitted it accordingly.

Verdict for the Defendant.

Park and *Gaselee* for the Plaintiff.

Garrow for the Defendant.

SITTINGS AFTER TERM
AT WESTMINSTER.

HOWARD *v.* WEMSLEY. *July* 1, 1806.

TRESPASS for breaking and entering the Plaintiff's house, and destroying the windows, &c.

A notice given on the 26th September, to quit at the end of six Calendar Months, is good to determine a holding, commencing on the 25th of March.

Plea, first of the General Issue and thereon; secondly, *Liberum Tenementum* in one *H. Kelly*, Esq. and justification as his servant.

Replication to the second plea, That one *Cubitt* held the house as tenant to *Kelly*, from year to year, and that being so possessed of an unexpired term in it, he had underlet to the Plaintiff, by virtue of which he entered and was possessed.

Rejoinder, That *Kelly* had given due notice to *Cubitt* to quit on the 25th of March, 1806; by notice bearing date the 26th of September, 1805; in *hæc verba*, "Take notice that you deliver up possession of the Premises you hold from me, on or about the end of six calendar months, from the 29th of September next ensuing the date hereof;" whereby *Cubitt's* term was determined and justified as to the several trespasses, so entering as servant to *Kelly*.

Surrejoinder, That the said *H. Kelly* did not give due notice to quit in manner and form, &c.

The facts of the case were, That *Kelly* was the Landlord of the premises, and had demised them to *Cubitt*, whose term commenced at Lady day: That on the 29th of September preceding, *Wemsley*, the Defendant, who was the agent of *Kelly*, had given the notice to quit as stated in the pleadings. That the Plaintiff who was Tenant to *Cubitt* refused to quit, whereupon the Defendant had entered with workmen to repair the house, which was the trespass complained of.

The Plaintiff's counsel denied the legality of this notice to quit, and that of course his possession was rightful when the Defendant entered. He was in by title as Tenant to *Cubitt*, and the action maintainable. That the notice should correspond with the holding, which was stated to be from the 25th of March, to quit on which day, the notice should be given, but which was not so here, it being given to quit at the end of six calendar months, and given on the 29th of September, so that the time to quit would be the 29th of March, which therefore did not correspond with the holding.

Lord ELLENBOROUGH ruled the notice to be sufficient; saying, That the 25th of March was the usual half-year, by computation, from the 29th of September, though not exactly corresponding in duration of time; the word Calendar was surplusage, for if he had omitted the word Calendar, or said half-year, it would be good.

Verdict for Defendant.

Garrow and *Lawes* for the Plaintiff.

Sir *V. Gibbs* and *'Espinasse* for the Defendant.

HOSKINS

HOSKINS, Assignee of DEIGHTON a Bankrupt, *v.* DUPEROY.

July 19, 1806.

ASSUMPSIT for money had and received, brought by the Plaintiff as Assignee of Deighton.

A debt of 100*l.* for goods sold on Credit will not support a Commission of Bankrupt until the credit expires, if a Bill is given for them; but if sold on the terms of giving a Bill at two Months, and no Bill is in fact given, a Commission on such a debt cannot be supported.

The action was brought to recover back a sum of 2,100*l.* paid by the Bankrupt to the Defendant, after an act of bankruptcy committed.

The act of bankruptcy was clearly proved to have taken place in the latter end of April, or beginning of May, 1805. The Defendant resisted the validity of the commission, and the only doubt in the case was as to the Petitioning Creditor's Debt.

The parties all lived at *Manchester*, and the debt accrued for goods sold and delivered by one *Hamer*, to the Bankrupt, at *Manchester*, in the usual course of Trade.

On the part of the Defendant it was relied, That no commission could be supported, but upon a debt actually due, or by reason of the petitioning creditor holding some written security, under the Statute 7 Geo. 1. ch. 31; and 5 Geo. 2. c. 30. The debt here was for goods sold and delivered; that the goods had been sold on a credit, which was not expired at the time of the act of bankruptcy committed. That, therefore, under the authority of the case of *Parslow* v. *Dearlove*, 4 East. Rep. 438, the commission could not be sustained.

No proof was offered as to the actual contract

itself for the sale of the goods, but the Defendant relied on the sale, being in the usual course of dealing, which was on credit, and which was urged to be insufficient as a debt not due at the time of the act of Bankruptcy.

Lord ELLENBOROUGH said, That that was not sufficient *per se*. but he would admit evidence as to the usual course of dealing at *Manchester*, and the credit that was usually given on the sale of goods in that place.

Witnesses were then called, who proved, That goods at *Manchester* were sold at different credits, but in every case the shortest credit was two Months, that it was usual sometimes to sell at two Months, and a Bill at the end of two Months; but it was admitted, that in some cases goods were sold at a present Bill for two Months.

It was then contended, That on a sale for a present Bill at two Months, a Commission could be supported under Stat. 5 Geo. 2; and that it might be presumed, that that was the case here.

The Defendant's Counsel answered, That if the transaction had been so, it was capable of proof, and for that purpose evidence should be given of the existence of such a Bill, which could easily be done if it had taken place by a production of the Bill itself; but if no Bill was produced, it was decisive that the goods sold, had been sold in the usual way, and on the usual credit.

Lord ELLENBOROUGH left it to the Jury, as to the course of dealing, and the terms on which the goods were sold; That a debt for goods sold on an

an unexpired credit, would not support the Commission: but if the course of Trade was to sell by a Bill at two Months, if they thought that such had been the course of dealing here, and believed that a Bill had been given, they should find for the Plaintiff, as a Bill would support the Commission.

The Jury found for the Plaintiff.

Garrow, *Park* and *Wood* for the Plaintiff.

Sir *V. Gibbs*, *Topping* and *Marryat* for the Defendant.

A new trial was afterwards had in this case, when it appeared that the goods had been sold for a Bill at two Months; but that no Bill had been given. It was decided, That that would not support a Commission. *Vide* 9 East, 498.

POTTS *v.* REED.

July 19, 1806.

ASSUMPSIT on a Bill of Exchange for 308*l.* 6*s.* 8*d.* drawn by *Gamon* on the Defendant in his own favour, and indorsed by him to *Pugh*, and by *Pugh* to the Plaintiff.

Gamon the drawer had been in partnership with *Pugh* and one *Reynolds*.

The partnership had been dissolved, and the effects

An indorsement of a Bill of Exchange, in these words: "Pay the contents of the Bill to A B, being part of the consideration in a certain deed of Assignment, executed by the said A B, to the Indorser and others, is not a limited Indorsement.

effects assigned to *Gamon* and a Mr. *Reed* as Trustee with him, and *Gamon* took the whole of the concern on himself; and part of the agreement on the dissolution was, that *Gamon* was to pay to *Pugh* 1,000*l.* by three instalments, which instalments were secured by Bills at different dates, and on one of them this action was brought.

The defence intended to be set up was, That this was to be a payment to *Pugh* only, who was himself to receive the money, and had promised *Gamon* that he would not negotiate the Bill: That it was agreed so to limit the payment, and that for that purpose the Bill should be specially indorsed. It was produced, and was indorsed in these words:—

"Pay the contents of the within Bill to Mr. *Evan Pugh*, being part of the consideration money in an Indenture of Assignment, bearing date the 28th Day of December, 1804, executed by the said *Evan Pugh*, to *Robert Reynolds Reed*, and myself."

"*A. Gamon.*"

It was contended, That this was a restricted Indorsement, and that the present holder could not claim as Indorsee. That the nature of a special Indorsement, was to restrict the payment to a particular person, as in the case of *Ancher* v. *Bank of England*, *Dougl.* 615, where the Bill was to be credited to the account of *Daht*, and was held not

not to be further negotiable. In this case, *Pugh's* name was specially mentioned, and the Fund from which the payment was made. That fund must be taken to have been credited by the Assignment mentioned in the Indorsement. That Bills payable out of a particular fund were not negotiable.

It was answered, That the Fund mentioned had nothing to do with the payment of the Bill, for which the Defendant was at all events liable. It was mentioned only as the consideration for it, and as for the Indorsement, it was a special Indorsement only, as far as mentioning the name of the Indorsee, whose Indorsement it rendered it necessary to prove, and nothing more.

Lord ELLENBOROUGH said he was of opinion, That this was not a restrictive Indorsement, and as to the other words they were surplusage, and could not affect the subsequent negotiability of the Bill. If the Bill was payable out of a particular Fund, it would affect the negotiability of the Bill; but what was here mentioned, was not the Fund out of which the Bill was to be paid, but the consideration for which the Bill was given, which the holder had nothing to do with. Mr. *Gamon* the Defendant, was here personally liable, though the liability might have been created by the Fund mentioned in the Indorsement, and as arising from the fund so designated by the Indorsement; and whenever a party was personally liable, a Bill was negotiable. It was however necessary to prove *Pugh's* Indorsement, as his name was mentioned in the Indorsement; but though

so

so made payable to him by name, there was nothing to restrain its future negotiability; in the case cited, the Bill was to be credited to *Daht's* account, no such restriction or direction was here.

Verdict for the Plaintiff.

Park and *Donaldson* for the Plaintiff.

Garrow, Gibbs and *'Espinasse* for the Defendant.

END OF TRINITY TERM.

CASES

ARGUED AND RULED

AT NISI PRIUS,

ON THE

HOME CIRCUIT.

CHELMSFORD SUMMER ASSIZES, 1806.

Coram HEATH, JUSTICE.

CLARKE *v.* CLARKE and BROWN. *July* 21, 1806.

If a Person, against whom a Commission of Bankrupt issues, acquiesces in it so far as to take a part in the Sale of his own Effects, under the Commission, he shall not afterwards be allowed to question it.

THIS was an action of Trover.

The action was professed to be brought against the Defendants, who were the Assignees under a Commission of Bankruptcy awarded against the Plaintiff, for the purpose of trying the validity of the Commission issued against the Plaintiff, which was

was contested, could not be supported, on the ground that he was a Farmer, and not an object of the Bankrupt Laws.

The Plaintiff called a Witness to prove the sale and conversion of the Goods which were his, and which had been taken under the Commission.

On his cross-examination he said: That he was an Auctioneer; that he had been employed by *Brown*, one of the Defendants, to sell the stock; but that he was so employed by the express recommendation of the Plaintiff himself, who had introduced him to *Brown* for the purpose of selling the effects; that he did so, and he had heard *Clark*, the Plaintiff, say, that he was perfectly satisfied with the Commission which had issued against him.

Per HEATH, Justice. How is this a tort or a wrongful conversion? Why has he acquiesced in it?

It was answered by the Plaintiff's Counsel, That it was an acquiescence in what he could not help. He was then declared a Bankrupt and bound to submit.

Per HEATH. He might submit to the commission, but he need not take any part in any thing done under it, nor shew his acquiescence under it. The action cannot be sustained, the Plaintiff must be called.

Plaintiff nonsuited.

Garrow and *Trower* for the Plaintiff.
Best, Serjt. and *Marryat* for the Defendant.

It was said by *Best*, Serjt. that the same point had been so ruled by MANSFIELD, C. J. in a case similarly circumstanced—Quere, if not that of *Like* v. *Hore* and *Rogers*—*Ante*.

IN THE COMMON PLEAS.

SITTINGS AFTER TERM AT WESTMINSTER.

JEKYLL *v.* Sir JOHN MOORE. *July* 3, 1806.

An action will not lie for a Libel against a Member of a Court-Martial, for observing on the conduct of the Prosecutor, as malicious and injurious to the service, and making that part of the sentence acquitting the officer tried by such Court-Martial.

THIS was an action for a Libel. The Libel complained of was, The including in the sentence of a Court Martial, whereof the Defendant was President, certain statements respecting the Plaintiff's conduct, which were false, scandalous and malicious representations of, and concerning the Plaintiff, unconnected with the duty of the Court-Martial, and with intent to injure and defame him.

The Plaintiff had been a Captain in the 43d Regiment of Foot, of which Colonel *Stuart* was the Colonel: Having preferred certain charges against the Colonel, he was tried by a General Court-Martial, of which Sir *John Moore* was President.

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The Court having heard the charges, honourably acquitted Colonel *Stuart* of the whole; and the concluding part of the sentence was to this effect: "The Court cannot pass over, without notice, the groundless and malicious charges preferred by Captain *Jekyll* against Lieutenant-Colonel *Stuart*, and of observing, that the conduct of Captain *Jekyll*, in endeavouring to hurt and calumniate the character of his Commanding Officer, is highly injurious to the service."

Upon the Case being opened, the Lord Chief-Justice, having expressed some surprize at the novelty of the charge, asked the Plaintiff's Counsel upon what grounds of Law it rested; and where was the publication necessary to constitute a Libel?

It was answered, That the warrant of his Majesty for holding the Court-Martial, states the Charges upon which the Party accused is to be tried, and the Court are ordered to enquire into and decide upon the charges: That that was the limit of their jurisdiction prescribed by the warrant: they had authority, therefore, in the present instance only, to acquit or convict Colonel *Stuart* of the charges preferred against him by Captain *Jekyll*; but they had not so confined themselves, but had gone beyond their power or duty in imputing improper motives to Captain *Jekyll's* proceedings, calumniating his character as if he had been actuated by motives derogatory to the good of the service, and in consequence of which, he was forced to quit the service; That as to the publication, that the sentence is laid

laid before his Majesty, and sent in general orders to every Regiment in the Kingdom.

Per Sir JAMES MANSFIELD, C. J. Was such an action as this ever heard of? Does this Court sit as a Court of Appeal from the judgement of the King, and of a Court-Martial? Shall Courts'-Martial, sitting for the benefit of the service, be restricted from giving their opinion as to the conduct of officers coming before them? They cannot step out of their way to slander another officer, but are they to be restrained from pronouncing a censure on an officer connected with the very case referred to them? If this was to be allowed, Sir *Charles Morgan*, the Judge Advocate, might have an action against him for a Libel, in laying the sentence of a Court-Martial before the King. The action is not maintainable, the Plaintiff must be called.

Best and *Bailey*, Serjts. and *Dampier* for the Plaintiff.

Shepherd, Serjt. *Adam*, and *Lens*, Serjt. for the Defendant.

Same Day.

PARTINGTON *v.* BUTCHER.

If Defendant to a debt, otherwise bound by the Statute of Limitations, admits the debt, but claims to be discharged by a written instrument, but which being referred to, does not amount to a legal discharge, he shall be bound by the admission, and the case be thereby taken out of the Statute.

ASSUMPSIT by the Plaintiff, as Trustee of *Elizabeth Butcher*, deceased, to recover from the Defendant the amount of two promissory notes, one for 700*l.* the other for 450*l.* bearing date in the year 1791; the notes were payable to Plaintiff, and expressed to be payable to him as such Trustee for her, in these words:- "I promise to pay to *Thomas Partington*, Esq. (as Trustee for my mother, Mrs. *Elizabeth Butcher*,) three months after demand 700*l.*" &c.

The Defendant pleaded two Pleas, *Non-Assumpsit*, and the Statute of Limitations.

Replication to the last Plea—That Defendant did undertake within six years, and issue thereon.

The Defendant was the son of *Elizabeth Butcher*, for whom the Plaintiff was Trustee: She was dead, and had had a considerable fortune, with a power of appointment among her children.

The Defence intended to be relied upon, as to 1,000*l.* under the General Issue, was a certain paper produced in evidence, signed by Mrs. *Elizabeth Butcher*, in these words:—

"Memorandum, August 4, 1792,

"Be it remembered, that I do hereby forgive "and relinquish to my son, *Thomas Butcher*, Jun. "all interest due, and to grow due, to me or my "Trustee,

" Trustee, upon my said son's two several notes of
" hand for 700*l.* and 450*l.* dated the 1st of January,
" 1791, and the 1st of July, 1791; it never being
" my intention to take any interest of my said son
" for the afore-mentioned sums, making together
" 1,150*l.*; and 1,000*l.* thereof, when called in, to
" be raised under my settlement.

" *Elizabeth Butcher.*"

The Attorney, for the Plaintiff, was called. He had been Attorney for Mrs. *Butcher* in her life-time, and by her directions had frequently applied to the Defendant for payment of the notes. He stated, that at the several interviews which he had with the Defendant, he always admitted the receipt of the money, and that it was unpaid; but said, he should not pay it, as his mother excused him from paying the 1,000*l.* by the memorandum, and as to the remaining 150*l.* that she was indebted to him in more than that sum for business done for her by him.

The Statute of Limitations had long before attached in the notes; but the Plaintiff's Counsel relied upon these admissions of the Defendant's as taking the case out of the Statute.

Shepherd, Serjt. for the Defendant, contended that they did not: That the rule of law was, That where an admission was relied upon, as taking the case out of the Statute, the whole must be taken together; and the admission must unequivocally allow the existence of the demand: In the case of *Owen* v. *Woolley*. *Bull. N. P.* 148, where the acknowledgment was, " I had the money, but *the Testa-*

trix gave it to me;" the latter words were held to qualify the generality of the first admission, and not to amount to a new promise or confession of the Defendant, sufficient to take it out of the Statute; this was a parallel case. Mr. *Butcher*, the Defendant, admitted that he had the money, but with the same breath discharged himself, and denied his liability; he said, I had the money, but I am discharged by my mother's Memorandum; that was a denial, not an admission of the Debt.

Per Sir J. MANSFIELD, Chief Justice. The law is correctly stated, That an admission to take a case out of the Statute must be all taken together. The case cited is good law, but does not decide this case; there the party absolutely denied the existence of any debt, relying on it as discharged by the gift of the Testatrix; that is not the case here. The Defendant does not insist on an absolute discharge, but *sub modo* only, by reference to his mother's Memorandum; if that does not discharge him, he admits that the Debt has existence. Where a party claims a discharge, as arising under a written instrument, as he has done; though he has a right to have his whole admission taken together, the Court have the same right, and will see whether that instrument so referred to, affords him a legal discharge or not: by reference to it, it will be found not to be so; it is not a legal discharge, for the paragraph relied upon as to the calling-in the money, shews that it was her intention that it should be called in, though she might afterwards apply it to another fund that is under her settlement.

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This, therefore, appears to me to be an admission sufficient to take the case out of the Statute, and that the Plaintiff is entitled to recover.

But the Defendant shall have liberty to move to set the Verdict aside.

Best, *Baily*, Serjts. and *'Espinasse* for the Plaintiff.

Shepherd, *Baily*, Serjts. and *Wigley* for the Defendant.

END OF TRINITY TERM.

CASES

ARGUED AND RULED

AT NISI PRIUS,

IN

MICHAELMAS TERM, 47 GEORGE III.

SECOND SITTING DAY IN TERM.

DOE *v.* SPILLER.

If a notice to quit is directed to the Tenant by a wrong Christian name, and he keeps it, it is a waiver of the mis-direction, and the lessor may recover on it, if there was no other Tenant of the name.

EJECTMENT to recover the possession of the Premises which the Defendant held, as Tenant to the lessor of the Plaintiff; the Defendant's Christian name was *Thomas*.

The notice to quit was directed to *George Spiller*.

Park, for the Defendant, objected, That the Plaintiff could not recover as the notice was wrong.

Lord ELLENBOROUGH asked if there was any *Thomas Spiller*, and if the Defendant had sent back the

the notice? It was answered in the negative. Whereupon Lord ELLENBOROUGH said, Then not having done so when he might have repudiated the notice, he should now hold him to be bound by it.

Verdict for the Plaintiff.

Garrow and ———— for the Plaintiff.
Park for the Defendant.

FIELD v. MITCHELL.

THIS was an action on the case for taking an excessive Distress.

Case will not lie for taking an excessive distress, where one thing only could be taken, though greatly exceeding in value the amount of the distress.

The case in evidence on the part of the Plaintiff was, That he was Tenant to the Defendant of certain premises; That seven guineas only being in arrear, the Distress was made by direction of the Defendant, and goods taken, which were valued by the Plaintiff's Witness at 30*l.*, but which in fact sold for 10*l.* only.

Express malice not necessary to be proved to support the Defendant.

These facts being proved, Sir *V. Gibbs*, for the Defendant, contended, That the Plaintiff upon the evidence given, and the facts proved as above stated, should be nonsuited; he contended, that to support the action, the taking must appear to be malicious, or the Plaintiff could not be entitled to recover. That all

the old cases to be met with in the books, in stating in what instances a Plaintiff was entitled to recover in this action on the ground of such excess was, where there was a great disproportion, as an Ox distrained for a penny, which is the case put in the books: that here the goods had sold but for a few pounds beyond the sum for which the distress was made, out of which the expences were to be deducted; That it was impossible to judge with sufficient accuracy, as to what things so taken would produce: if taken as a distress under any circumstances, they sold to a certain disadvantage, and it would therefore be extremely hard to subject a party to an action for taking goods, where so trifling an excess in value only appeared.

Lord ELLENBOROUGH. There is a distinction between the cases, where there is but one thing which can be distrained, and where there are many, and so the Distress is divisible. If there is but one thing which can be taken, so that it must be taken, or the party must go without his Distress, for taking it no action lies, though it much exceeds the sum for which the Distress is taken: But if there are several articles of some value, and there is much more taken than is sufficient to satisfy the rent and expences; this action is maintainable, and express malice is not necessary to the maintaining of the action, nor required to be proved; but it is not for every trifling excess that this action is maintainable, it must be disproportionate to some extent, and if disproportionate to an excess, the action is clearly maintainable.

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To prove that in fact, the value of the goods did not exceed 12*l.* and that after satisfying the Distress and expences there was but 16*s.* remaining, which the Defendant had offered to return to the Plaintiff, the Defendant's Counsel called a Witness of the name of *Costor*; he was the Broker who made the Distress by the direction of the Defendant *Mitchell*, and by whom the goods had been sold.

Garrow objected to his evidence unless he was released.

Lord ELLENBOROUGH said he was inadmissible. The Witness had been employed by the Defendant to make the Distress; he must be presumed to do it properly, and according to law and his duty, and if there was any thing wrong in it, or if he exceeded his authority, whereby he had subjected his principal to an action, he would be answerable over to the Defendant who employed him. It was not distinguishable from the case of the driver of a carriage, by whose conduct an injury had been suffered.

The broker who made the distress is not an admissible Witness for the Defendant unless released.

Verdict for the Plaintiff, 40*l.* Damages.

Garrow and *Marryat* for the Plaintiff.

Gibbs, *Park* and *'Espinasse* for the Defendant.

DANIEL

Dec. 2, 1800.

DANIEL *v.* PITT.

If a person says, I'll pay you money, if A B says it is due, and A B being applied to, says it is due, but is dead at the time of the action brought, what he had said respecting the debt, is evidence.

THIS was an action of *Assumpsit* for goods sold and delivered.

Plea of *Non-assumpsit.*

The action was brought to recover the price of two blocks of Portland stone sold by the Plaintiff to the Defendant.

The Defendant denied that he had received them.

The evidence in the case was, That the Defendant lived at Enfield: That the stone was to be sent to him by a waggon hired from a person of the name of *Law*; the driver of the waggon's name was *Coombes*, the servant of *Law* at the time of the delivery of the stone, and he was proved to be then dead.

The Plaintiff proved the delivery to *Coombes*, and that he had taken the stone in the waggon from the Plaintiff's yard; but there was no further proof of any actual delivery to the Defendant.

The Plaintiff then proposed to give in evidence, That upon the price of the stone being demanded of the Defendant, he at first denied the delivery, but afterwards said, "If *Coombes* says that he delivered the stones to me, I will pay for them." The Plaintiff then proved, that in consequence of what the Defendant

Defendant had said, *Coombes* had been applied to, and asked if he recollected his having delivered the stones to the Defendant; he said he recollected it perfectly well; that the Defendant was not then at home, when he came with them to his house at *Enfield*, but his housekeeper ordered him some beer at an adjoining public-house, after he had delivered the stone in the Defendant's yard.

It was objected, That this was inadmissible, being the mere declaration of *Coombes* without oath.

Lord ELLENBOROUGH said, That it was admissible evidence, and had been so decided by the twelve Judges in *Hastings*'s trial: That when one says, "if such a person says that I received the money I'll pay it:" If the person referred to is dead, what he has been heard to say on being applied to on the subject, in consequence of such reference, is evidence.

His Lordship admitted it, and the Plaintiff recovered.

Garrow and *'Espinasse* for the Plaintiff.
Marryat for the Defendant.

Dec. 3. POWELL *v.* ROACH *& Alt.*

It would defeat an action on a Bill of Exchange, that it was not produced or shewn to be lost or destroyed, though the party promised to pay it.

THIS was an action brought to recover the amount of a Bill of Exchange, drawn by *Tyler* and *Co.* on *Taylor* and *Co.* payable to the Order of the Defendants, and by them indorsed over. It was afterwards paid by *Boreman* and *Co.* to the Plaintiff for goods sold.

When it became due it was presented at *Taylor* and *Co*'s. the Acceptors, for payment by a Banker's Clerk, who, in the usual way, received in payment a Check on *Harrison* and *Co.* for the amount.

This Check was dishonored, and notice was immediately given to the Defendants, that the Bill had not been paid; they acknowledged there was such a Bill of their's outstanding, that they were surprised the Acceptors had not paid it, and promised to pay it, if it was produced to them.

The Acceptors absconded, and this action was brought against the Defendants as the Indorsers.

At the Trial the Plaintiff was unable to produce the Bill, and relied on the facts as above stated, and no evidence was offered to prove that it was lost or destroyed.

It was objected by the Defendant's Counsel, That the Bill should be produced, as otherwise the Defendants might be called upon afterwards by the actual holder, and so be twice subjected to the payment of it; and as to the promise, that the Defendants had only promised to pay on production of the Bill,

Bill, and they had therefore a right to insist on the condition, as if produced they could pay it with safety.

Garrow, for the Plaintiff, contended, That as the ground of defence taken by the Defendants was a possible future liability, it was clear there would be none; for as this Bill was in the hands of the Plaintiff when it became due, no other person, who might become possessed of it afterwards, and after it became due, could recover on it, against the Defendants, for this reason; That they would be entitled to rest on the Plaintiff's title to the Bill at that period, and the recovery of the value of it by him, which would defeat any action against them: That the Plaintiff was entitled to recover, as the Defendant had admitted that the Bill was outstanding, and had promised to pay it, and cited *Hart* v. *King*, 12 Mod. 350, as the Bill might be presumed to be lost.

Lord ELLENBOROUGH said, He was clearly of opinion, that in this case the Defendant was warranted in resisting the demand, unless the Bill was produced, as he ought not to be subjected to another action on the Bill by a third person, and be left to protect himself by reason of the recovery in this action against him; the Defendant never meant to waive his right to have the Bill delivered up to him as soon as he had paid it.

Plaintiff was nonsuited.

Garrow and *Curwood* for the Plaintiff.
Manley for the Defendant.

WILKES

Dec. 5. WILKES *v.* LISTER.

If Executors, who are by the Testator's will to carry on his trade for the benefit of his family, suffer a person to carry on the trade in his own name, such person may bring actions in his own name, for goods sold by him, though afterwards accountable to the Executors.

ASSUMPSIT for goods sold and delivered.

Plea of *Non-assumpsit.*

The Plaintiff was a brass-founder, the Defendant a coach-plater; and the action was brought to recover the sum of 28 *l.* for goods sold, the delivery of which the Plaintiff proved.

The defence set up was, That the Plaintiff had lived with a man of the name of *Wilkes*, by whom she had two children, and passed for his wife for many years. *Wilkes* had carried on, in his life-time, the business of a brass-founder, and by his Will left his property to his two Executors, as Trustees for the Plaintiff and her children; and it appeared further in evidence, that the surviving Executor had suffered the Plaintiff to carry on the business, not on her own account, but of the Estate; and it was then contended, That the action should have been brought in the Executor's name, she being a mere servant, and not carrying on the business on her own account, and that she could not maintain it.

To prove these facts, the Executor was called as a witness; his competency was objected to, inasmuch as he claimed the money sought to be recovered by this action, as part of the Testator's estate; and that he having the use of the money, and perhaps some interest as Executor in the *residuum*

residuum, that gave him such an interest as rendered him incompetent.

It was answered, That his being a Trustee merely was no objection; and that as to any interest in the *residuum*, that was not the case here, as the whole property was given to the Plaintiff and her children.

Lord ELLENBOROUGH said, This answered the objection, and he admitted his evidence.

The Executor proved the facts above stated, and relied on by the Defendant as matter of defence; but it was admitted by him, that the Plaintiff carried on the business in her own name with his consent and approbation; that the witness had published an advertisement announcing to the public—"That the Plaintiff, by the name of *Sarah Wilkes*, had continued the business carried on by her late husband, and soliciting the favors and employment of his customers;" and that he also had written the words *S. Wilkes* at the head of the pass-books, which went between her and her customers.

Before Sir *V. Gibbs*, who was Counsel for the Plaintiff, began his reply, Lord ELLENBOROUGH interposed: he said, He desired to inform the Jury of his decided opinion, in point of law, on this case. There was no pretence in law for the defence set up, taking the facts in their fullest extent. The Executor had suffered the Plaintiff to trade in her own name; he had given her the credit of a trader on her own account to the world, and if the Executors chose to carry on the trade of the Testator for the benefit of the Estate, they must do it in their own names, that is as far as respected strangers; for if they

they suffered another person to do it, though it was for the benefit of the Estate, as they made that person the ostensible trader, they gave that person the right to sue for all debts due to the concern. The Executors might file a Bill afterwards to call the person, carrying on the trade, to account for what she had received, which might have been done here; but that was a matter between themselves; but as to other persons, they could set up no such defence as here attempted.

The Defendants Counsel acquiesced in his Lordship's opinion.

Verdict for the Plaintiff.

Sir *V. Gibbs* and *Espinasse* for the Plaintiff.
Garrow for the Defendant.

AT GUILDHALL.

Dec. 9, 1806. THOMAS *v.* ANSLEY and SMITH, Sheriffs of London.

A parol evidence is inadmissible to shew the day on which a trial at *Nisi Prius* takes place.

THIS was an action of trespass for breaking and entering the Plaintiff's house, and taking articles of Household Furniture stated in the Declaration.

The Defendants pleaded first, Not Guilty; and secondly, That a Judgment having been obtained,

at

at the suit of one *Messenger*, against one *John Jones*, a writ of *fieri facias* issued, directed to the Defendants, to levy on the goods of *Jones*, and then justified the taking the goods as the goods of *Jones*.

Replication admitting the Judgment, with a *de injuriâ sua propria absq. residua Causæ*.

The Plaintiff claimed title to the goods in question, under an assignment made by *Jones* to him; the house had been a public-house, and on the 19th day of May the Plaintiff was regularly appraised into the house; the furniture, liquors, &c. being fairly valued, and evidence was given of the payment of different sums of money by *Thomas* the Plaintiff, on *Jones*'s account, and at the time of the appraisement a Draft given by *Thomas* to *Jones* for 10*l.* 8*s.* the balance of the appraisement. These facts were proved.

The defence relied upon was, That the transaction was fraudulent, and done to defeat *Messenger*'s execution, the transaction having taken place subsequent to the Trial.

It was then stated, That the verdict was obtained on the 14th of May, in the Common Pleas, but that final judgment could not be obtained until the 21st of May, which was on a Monday, and this transaction took place on the 19th, being the Saturday preceding.

It was proved that the Sheriff's Officer went into possession on the 22d, and sold on the Saturday following.

It became material to ascertain when notice of

Trial was given in the cause of *Messenger* v. *Jones*, and when the cause was tried.

A witness was put into the box, and asked when notice of trial was given.

It was objected to proving this by parol, and it was accordingly proved by producing the Issue and notice of Trial indorsed, and then the delivery of the Issue was proved.

A witness was then asked, When the cause came on to be tried in the Court of Common Pleas? he said, At the Last Sitting in Term. He was then asked on what day of the month the Trial had taken place?

It was objected by *Garrow*, on the ground that this fact could not be so proved; that it was matter which should be proved by production of the Record itself.

It was answered, That the trial of a cause was a fact which had taken place on a particular day, and could therefore be proved by parol.

Lord ELLENBOROUGH said, That he could not receive parol evidence of the day on which the Court sat at *Nisi Prius*, as that was capable of other proof by matter of record.

The evidence was accordingly refused.

Verdict for the Plaintiff.

Garrow and *Espinasse* for the Plaintiff.

Sir *V. Gibbs* and *Marryat* for the Defendant.

[The

[The following case being to the same effect as the preceding one, I have inserted it from a manuscript note.]

SITTINGS AFTER MICHAELMAS TERM, 1788.

REX *v.* HAMMOND PAGE.

Dec. 5.

THIS was an Indictment for Perjury, on an Issue which had come on to be tried at *Nisi Prius*, and there referred.

The Prosecutor gave in evidence, the *Nisi Prius* Record, by which it appeared when the Issue was joined: but no *Postea* being indorsed, the Prosecutor's Counsel offered the parol evidence of the Officer, that the cause came on to be tried on a particular day, and the Rule of Court to prove the reference of the cause, which *Mingay* alledged was, in this instance, the best possible evidence, because the Jury having given no verdict, there was nothing to indorse on the *Postea*.

On the other hand, *Erskine* objected, That the time of such a trial could only appear by matter of record, viz. by indorsement of the *Postea*; and notwithstanding the reference, the *Postea* ought to be indorsed; That the Jury was sworn, and either that a Juror was withdrawn, or a verdict taken for the Plaintiff, subject to the reference.

Lord KENYON at first was of opinion, That these proceedings must be proved by the record, and not by parol evidence, or by the rule of Court, which was between other parties; but he thought that the *Postea* might be so indorsed now in Court. He said, that in civil cases it is common to allow indorsements in Court of notes or bills, or alterations in blank indorsements to answer the facts of the case; and he knew no difference between civil and criminal cases, where there were materials by which to amend. He said, he had known instances of amendments in capital cases from the officer's notes at a great distance of time. However, on reading the allegation in the indictment, "That the cause came on to be tried before a Jury of the Country;" and, "that a Jury was sworn," he thought that these facts only could be proved by the Record, and that it would be too much to say, that the whole *Postea*, with the names of the Jurors, and that one thereof, viz. the last sworn, was withdrawn from his fellows, should now be indorsed; but what was conclusive was, that when so indorsed, it could not be given in evidence in another cause without being stamped, though it is not usual to stamp it on making it up.

Defendant acquitted.

Mingay and *Baldwin* for the Prosecution.
Erskine and *Wood* for the Defendant.

BAYLEY & *Alt.* v. WYLIE.

Dec. 9.

ASSUMPSIT on a Policy of Assurance on the ship called the *Vanholden*, from *Charlestown* to *Liverpool*.

Depositions taken under an old commission may be admitted without producing the commission, as it may be presumed to be lost, *aliter* where under a recent one. The bill and answer need not be produced.

A Bill had been filed in the Court of Exchequer, and a Commission had gone out to take the Depositions of witnesses at *Charlestown*.

At the trial the Depositions were produced. Their admissibility, as evidence, was objected to by *Garrow*, for the Defendant, unless the Commission, under which the Depositions were taken, was also produced, and the Bill and Answer upon which the Commission had been founded.

Sir *V. Gibbs* read the beginning of the Depositions, which stated the taking of the Depositions under a Commission from the Court of Exchequer, and contended that that was sufficient.

Lord ELLENBOROUGH said, If these had been Depositions of a long standing, where, by presumption, the Commission might be lost, he might perhaps have admitted the Depositions alone; but in the case of recent transaction, and where the Depositions had been lately taken, he should require the Commission to be produced; but that no state of things could make it necessary to produce the Bill and Answer, provided the authority under which the Depositions were taken, namely, the Commission, was produced.

It afterwards appeared, that the Defendant's

attorney had agreed to admit the Depositions in that Cause.

Lord ELLENBOROUGH said, That by the words "in that cause" he had connected the Depositions with the Cause, and they were accordingly admitted.

Verdict for the Plaintiff.

Sir *V. Gibbs* and *Newbold* for the Plaintiff.

Garrow, *Marryat* and *Jervis* for the Defendant.

Dec 11, 1806.

DUNKLEY *v.* BULWER and LLOYD.

Where a seaman has been impressed, and so would be entitled to wages for the time he had served under Stat. 2 Geo. 2. that claim must, however, depend on the completion of the voyage. For if the vessel is lost, as the rest of the crew thereby forfeit their claim to wages, the impressed seaman equally forfeits his claim for wages up to the time of his being impressed.

THIS was an action of *Assumpsit* brought against the Defendants, as owners of the ship *Bridget*, to recover the amount of wages claimed by the Plaintiff, for his services as a sailor on board that ship.

The facts of the case were these; On the 20th of January, 1804, the Plaintiff was hired as a sailor to serve on board the *Bridget*, then bound on a voyage from *Shields* to *Gibraltar*, at the rate of 6 *l.* 3 *s.* per month. The ship sailed on that voyage, and arrived at *Gibraltar*, when she discharged her cargo, about the end of the month of May, 1804.

The Plaintiff then engaged to serve on board her for the homeward bound voyage, on which voyage she was to go to *Zante* to take in a cargo of fruit, and to return with it to *England*.

On

On the 17th of November, 1804, the ship having taken in her cargo, and then being at the island of *Malta* on her homeward-bound voyage, waiting for convoy, the Plaintiff, who was then serving as a seaman on board her, was impressed and carried on board his Majesty's ship *Arundel.*

The ship remained some time at *Malta,* but on the 5th of February, 1805, being after the time the Plaintiff had been impressed, having sailed on her homeward voyage, she was captured and destroyed.

The Defendant paid into Court the amount of the wages for the whole of the outward-bound voyage to *Gibraltar,* but nothing on account of the homeward.

The question in the case was, Whether the Plaintiff was entitled to recover wages on the homeward-bound voyage, up to the time of his having been impressed.

The Plaintiff grounded his right to recover on the effect and operation of the Statute, 2 Geo. 2. ch. 36, by which it is provided, "That any seaman entering into his Majesty's service shall not be deemed a desertion nor cause a forfeiture of his wages." That in this case, under the Statute, he was entitled to his wages up to the time of his going on board the King's ship; and that in fact the usage of the navy was correspondent with it: That as he therefore had a right of action on his going on board the King's ship, it could not be divested by any subsequent matter.

Lord ELLENBOROUGH said, That seamen's title

to wages depended on the completion of the voyage when the ship became entitled to freight; but when the ship was lost, all title to wages, as to every part of the crew, was at an end, and they had no claim on that account. If a seaman deserted before the voyage was completed, by his not serving to the conclusion of the voyage, he forfeited all right to wages for any part of the voyage; and the Act of Parliament meant to give the sailor, who entered on board a King's ship, a remedy for his wages for a partial service, which another sailor could not have, for he thereby got a title to wages for such partial service, and without waiting for the completion of the voyage; but that the act was meant to be confined to cases where all the crew were entitled to wages, by reason of the ship's arrival, and by the completion of her voyage, not to cases where the voyage was not completed, and no wages could be claimed by the crew at all; when that voyage was defeated, the law deprived the whole crew of any wages whatever, and he, for his partial services, could not be in a better situation than they for the whole. Here as no wages whatever could be claimed by the seamen, the Plaintiff must suffer the loss to the full extent of the wages on the homeward voyage, the wages on the outward voyage, that is to the arrival at *Gibraltar*, having been paid into Court.

There was a Verdict for Defendant.

Park and *'Espinasse* for the Plaintiff.

Sir *V. Gibbs* for the Defendant.

WARRINGTON & *Alt.* *v.* FURBER and WARRINGTON.

Dec. 12, 1806.

A guarantee given by third persons on the sale of goods, is within the exception of the Stamp-acts respecting agreements, and need not be stamped.

ASSUMPSIT for money paid to Defendant's use. *Warrington*, one of the Defendants, suffered judgment to go by default, and *Furber* the other Defendant pleaded *Non-Assumpsit* and Bankruptcy.

The Defendant's had carried on trade under the firm of *Warrington* and *Furber*; and having occasion to buy goods, they applied to a Mr. *Martin* to purchase goods from him. He refused to let them have the goods on their own credit, or unless the payment was guaranteed by some other house of credit. In consequence of that, they applied to the Plaintiff's to become guarantee to *Martin* for them, and they gave their guarantee for the purpose of being given to *Martin* in the following words:—

"MR. THOMAS MARTIN."

"SIR, "May 9, 1801."

"At the request of Messrs. *Furber and Warrington*, who informed us they were about purchasing goods of you, to the amount of 1000*l.*; we hereby guarantee the payment of that sum, if purchases are made, say at six Months."

Signed by Plaintiff.

Upon this guarantee *Martin* delivered goods to *Furber*

Furber and *Warrington*, to the amount of 1000*l.* and in payment for them took a bill at six Months, accepted by the Defendants, and drawn in favour of Martin, which became due in December following. In the Month of November, before the bill became due, *Furber* and *Warrington* became bankrupts; *Martin* did not prove his debt under *Furber* and *Warrington's* Commission, either on the bill which he held, or for the value of the goods sold, but called upon the Plaintiffs under the guarantee, after the bill became due and was unpaid; the Plaintiffs paid the money, and now brought their action to recover that sum, as money paid to the use of the Defendants.

The defence of bankruptcy was abandoned by the Defendant *Furber*, who had pleaded it, as the money was paid after the suing out of the Commission, and the Plaintiff had no claim against the Bankrupts estate, until called upon under their guarantee.

The Plaintiffs called *Martin's* clerk, who received the guarantee, to prove the whole transaction; and the guarantee was put into his hands; it was an unstamped paper; when about to be read,

Sir *V. Gibbs* objected to its being received in evidence. His objection was, That it was an agreement by which the Plaintiff agreed upon a certain event, to pay a sum of money on account of the Defendants, and should therefore be stamped.

It was answered, That it was an agreement for the sale of goods, and by the Stamp Act, imposing a Stamp

a Stamp or Agreement, those relating to the sale of goods are excepted, and therefore did not require a Stamp, as being of that description.

It was answered by Sir *V. Gibbs*, That the Statute exempting from the necessity of Stamps, Agreements for the sale of goods, applied to cases only of present sale, and not as in this case where there might no sale take place, or at all events was in future. And the Plaintiffs Counsel having mentioned the case of *Curry* v. *Edensor*, 3 T. Rep. 524, as applying to the present, he said that in that case, Lord *Kenyon* had laid great stress on the circumstance of the transaction being for a present sale.

Lord ELLENBOROUGH first observed, That the impression of his mind was, that the clause of the Statute which exempted such agreements from the necessity of being stamped, seemed to apply to cases of sale between the buyer and seller, and not to cases such as the present, which was an agreement with a third person; but his Lordship's attention being called to the case of *Curry* v. *Edensor*, which was a contract by which a broker, having by writing agreed to indemnify his principal on a sale of goods, against any loss on the resale, which was written on a piece of unstamped paper, his Lordship said was in point, and ruled that the guarantee in question should be received in evidence, particularly as the words of the act spoke of agreements, not merely *for*, but *relating to* the sale of goods.

Verdict for Plaintiff.

Garrow

Garrow and *Espinasse* for the Plaintiff.
Sir V. Gibbs for the Defendant.

This case was afterwards moved in the Court of King's Bench, who agreed in opinion with the Lord Chief Justice. *Vide* 8 *East*, 242.

IN THE COMMON PLEAS.

SITTINGS AFTER TERM AT GUILDHALL.

Decr. 16, 1806.

Fonsick *v.* Agar and Others.

Where, by rule of Court, a witness about to go abroad, is permitted to be examined on Interrogatories, they may be given in evidence, if the witness has sailed on the voyage, though he may have been put back into Port from bad weather.

This was an action of *Assumpsit* to recover a sum of 38*l.* claimed by the Plaintiff as crimpage, for procuring seamen to man the ship "*General Stuart*," then proceeding on a voyage to the East Indies.

A motion having been made during the Term to put off the trial, it was made a part of the Rule, That a Captain *Rogers*, who then commanded the "*General Stuart*," who was a material and necessary witness for the Defendant, and likely to be absent

absent on his voyage, when the cause should come on to be tried, should be examined on Interrogatories. Captain *Rogers* was examined on Interrogatories, which were produced.

It being however necessary, before they were read as evidence, to prove, That he was within the meaning of the Rule, that is, absent from the kingdom at the time of the Trial, a witness was called to prove it. His testimony was, that Captain *Rogers* had sailed with the ship from the river, and had arrived at Portsmouth on his outer-bound voyage: That he had there waited for Dispatches from the India House, which Dispatches had been sent to him some days before; and the wind said, That if the wind was fair, he believed the ship might then have sailed, though she was to sail with convoy.

It was objected, That this did not satisfy the Rule, and that Captain *Rogers* should be called. That the rule of evidence was a strict one: that Depositions of witnesses could not be read in a Court of Law, where *viva voce* evidence was to be had of the fact; which was only under particular circumstances, and by Rule of Court; to satisfy which, it should be distinctly proved, that the witness was absent from the kingdom, and incapable of being called.

Sir J. MANSFIELD, said, That he should admit the Interrogatories to be read. The Rule was not to be taken so strictly, as to require it to be absolutely necessary, that the witness should be on his voyage, when the trial came on. If the ship had

sailed,

sailed, though put back, or if the witness had gone on board, and was ready to sail, though prevented by contrary winds, that would be sufficient.

It might happen that a witness might lose his voyage or his convoy, while attending a trial, though *bonâ fide* then intending to sail.

The case was referred.

Best, Serjt. and *'Espinasse* for the Plaintiff.
Shepherd, Serjt. for the Defendant.

END OF MICHAELMAS TERM.

CASES

ARGUED AND RULED

AT NISI PRIUS,

IN

HILARY TERM, 46 GEO. III.

SITTINGS AFTER TERM

AT WESTMINSTER.

PIMM *v.* GREVILL.

Feb. 16, 1807.

THIS was an action of *Replevin*, for taking Plaintiff's goods.

In *Replevin*, where a tender is pleaded, and a subsequent demand and refusal replied, the demand must be made by, and the refusal be to the Defendant, if so made to one sent or authorised by him, the evidence does not support the Issue.

The Defendant made cognizance as Bailiff to Mr. *Slade*, who was the landlord of certain Premises held by the Plaintiff of him, of the taking as a Distress for rent in arrear up to the 25th of March, 1806.

The Plaintiff pleaded, in bar of this cognizance, That after the rent became due, and before the Distress

Distress made, he had tendered and offered the rent to *Slade*.

Defendant replied a subsequent demand, and refusal by the Defendant, as Bailiff to *Slade*, upon which issue was joined.

The evidence was, That *Grevill* the Defendant, who was a broker, had been authorised and employed by *Slade* to make the Distress in question for rent in arrear. He had not gone himself to *Pimm* the Plaintiff's house, but had sent his son to make the Distress in *Pimm's* house, and he had demanded Mr. *Slade's* rent. *Pimm* answered he could not pay it, as he had already tendered it to Mr. *Slade*. The son was then proceeding to make the Distress, when the Plaintiff asked him by what authority he was acting, and desired to see it; and afterwards said, if he would shew his authority, he would pay him the rent. It did not appear that he produced any authority, or that any money was then offered.

It was relied upon for the Plaintiff, that this did not support the Replication, which was a subsequent demand and refusal of the rent by the Defendant; whereas, there was no demand of the rent whatever made by him, nor was he present, or in fact on the premises at all.

Sir *V. Gibbs* contended, that the evidence did support the issue: That the issue was, whether the money was demanded and refused, independent of any reference to the character of the person by whom it was demanded. That, in law, if the issue was on a tender to the Defendant, evidence of a tender

tender to the son would be good; and so therefore was a demand by him: That as the whole case of the Plaintiff turned upon the taking of the Plaintiff's goods; which was done, not by the Defendant himself, but by his son, the Plaintiff could not adopt the act of the son, to charge the father for one purpose, and not admit his power of acting for another: that he, therefore, was to be considered as the Defendant himself for that purpose, and the demand was therefore good, as made by him in the character in which the Plaintiff had adopted him.

Lord ELLENBOROUGH said, That the evidence did not establish the Issue; that if the Issue had been on a Tender to the Defendant, as Bailiff of *Slade*, it could not be sustained, for his was a delegated authority and could not be delegated; the son had no authority; he had equally no power to receive the rent, or give a discharge for it; so circumstanced, a Tender to him was not a legal or sufficient one, and the Plaintiff was entitled to recover.

Verdict for the Plaintiff.

Garrow and *Lawes* for the Plaintiff.

Sir *V. Gibbs* and *'Espinasse* for the Defendant.

Lawes cited *Coore* v. *Callaway*, 1 *'Esp. N. P. C.* 115.

Same day.

WALKER *v.* LISCARRAY.

Where an annuity has been granted for a sum paid as a consideration for it, that is, money had and received from the time of the grant, if the annuity is at any subsequent time set aside, and where the grantor became bankrupt after the grant, but subsequent to its being set aside, it is barred by his certificate.

THIS was an action for money had and received.

Pleas of *Non-Assumpsit* and Bankruptcy.

The action was brought to recover a sum of money, being the consideration paid by the Plaintiff for an Annuity granted to him by the Defendant, in the month of January, 1801. This Annuity had been set aside by the Court in Michaelmas Term, 1805, on account of a defect in the memorial; prior to the Annuity being so set aside, the Defendant had became a Bankrupt, and had then obtained his Certificate. The present action was brought to recover back the consideration by an action for money had and received, on the authority of the case of *Shove* v. *Webb*, 1 T. Rep. 732.

The Defence was, That the Defendant was protected by his Certificate; that the action being for money had and received, the cause of action arose from the time of the payment of the money as the consideration for the Annuity, which money was paid in the year 1801; that though the Annuity was not set aside until Michaelmas Term, 1805, yet having been then set aside, it had relation back to the time of granting it, and was of course a Debt prior to the Defendant's commission, and therefore barred by his Certificate.

The case of *Hicks* v. *Hicks*, 3 East, 16, was cited. It was contended for the Plaintiff, That until the Annuity

nuity was actually set aside, there was no debt due to the Plaintiff, which could be proved under the Commission, except the arrear then due of the Annuity. That at the time of the issuing of the Commission there was no debt due to the Plaintiff for the consideration, the Annuity not being then set aside; and that if there was no debt which was provable under the Commission when it issued, the Certificate was no bar.

Lord ELLENBOROUGH said, The Annuity having been set aside, must be considered as if it had never existed; of course the relation took place to the time when the money was paid, which having been paid for an Annuity afterwards set aside, there was no consideration for the money paid, and the Plaintiff's title to the money was from that time: the Plaintiff's right to the money having therefore preceded the Bankruptcy, the Certificate was a bar.

Verdict for the Defendant.

Park and *Lawes* for the Plaintiff.

Garrow and Sir *V. Gibbs* for the Defendant.

SITTINGS AFTER TERM
AT GUILDHALL.

March 2. GWYLLIM *v.* SCHOLEY & *Alt.*

In case against the Sheriff for taking insufficient pledges in Replevin, in proof of the insufficiency of the circumstances of them; it is evidence that they were in debt, had been applied to for payment, and promised payment but did not pay.

THIS was an action against the Sheriff of Middlesex, for taking insufficient pledges in Replevin, one of these was of the name of *John Johnson*.

To establish the fact of *Johnson's* insufficiency, the Plaintiff's Counsel was proceeding to inquire into his circumstances, and among other matters proposed to prove, applications made to him for money by different Creditors at different times, which he was unable to pay: which he had made repeated promises to pay, but which promises he had as repeatedly broke.

This was objected to by *Garrow*, of Counsel for the Defendant, That the action was against the Sheriffs, and what *Johnson* had said was not evidence; the declarations of third persons never being admitted as evidence against a Party in the Cause.

Lord ELLENBOROUGH ruled, That it was admissible evidence; that it was material to ascertain *Johnson's* circumstances: the fact in Issue, being as to his fitness or unfitness to have been received as Bail

by

by the Sheriff, and that that was to be collected, as well from his own declarations as from facts otherwise capable of proof. He therefore admitted the evidence.

Sir *V. Gibbs* and for the Plaintiff.
Garrow for the Defendant.

JOHNSON *v.* LEWELLIN.

THIS action was brought by the Plaintiff, who was a seaman, against the Defendant, who was the Master of the vessel in which the Defendant sailed as a mariner; for wrongfully putting him on shore on the Spanish Main, by which he lost the advantage and profits to be derived from his services on board the ship for the voyage for which he had engaged.

Though an instrument comes out of the possession of the adverse party in consequence of a notice to produce it, if it has been executed in the presence of a subscribing Witness, he must be called to prove the execution of it.

To prove the fact of his having been hired as a sailor for the voyage: his wages and situation on board: and that the Defendant was master; notice had been given to produce the ship's articles executed by the Captain and the crew.

They were produced, but Sir *Vicary Gibbs* objected to their being read, unless the subscribing Witness was called to prove the execution of it, stating, at the same time, that there were other facts, inde-

pendent of the proof of the execution of the instrument, to which he meant to examine the Witness.

Garrow, for the Plaintiff, contended, that as the instrument came out of the Defendant's custody, where the opposite party could not know who the subscribing Witness was; that that superseded the necessity of his proving the execution by the subscribing Witness, and cited the *King* v. *Middlezoy*, 2 T. Rep. 41, as expressly deciding the point.

He further relied, that the Statute 2 *Geo.* II. ch. 26. made the Articles of themselves evidence, so that it became unnecessary to give any evidence of the execution of them whatever.

Lord ELLENBOROUGH said, The Rule of Law was clear, that Instruments witnessed must be proved by those whose names were subscribed as witnesses to the execution: That it appeared to him, that the Law of the *King* v. *Middlezoy*, though it went the length cited by the Plaintiff's Counsel, appeared to have been decided without due consideration, and that he should hold himself not to be bound by it, but expect to have the subscribing Witness called.

That as to the Statute 2 of *Geo.* II. ch. 26, That applied to actions by sailors for wages only.

A Juror was afterwards withdrawn by consent.

Garrow and ——— for the Plaintiff.

Sir *V. Gibbs* for the Defendant.

CASES

ARGUED AND RULED

AT NISI PRIUS,

ON THE

HOME CIRCUIT.

MAIDSTONE LENT ASSIZES, 1806.

Coram LORD CHIEF BARON MACDONALD.

COBB, Clerk, *v.* SELBY.

March 25, 1807.

THIS was an action on the case.

The Declaration stated, That the Plaintiff was Rector of Ightam, in Kent; and as such, entitled to the Tithes of that Parish; That the Defendant was the owner and occupier of Lands within the Parish, to the Tithes of which the Plaintiff was entitled:

Where there is private road through a Farm, the Parson may use it for carrying away his Tithe, though there is another public road equally convenient.

That the Plaintiff as such Rector had and used, and ought to have and use, a certain way leading from the King's Highway through a certain gate unto a certain Close called the Seven Acre Close, belonging to the Defendant, to gather and collect his Tithes, and to go, return, pass and repass, for the purpose of collecting, gathering and carrying away his Tithes growing on the said farm and lands: He then assigned a breach that certain Tithes on the said land being severed and set out, that he had entered for the purpose of carrying away the Tithes so severed and set out, and that the Defendant obstructed the said way.

Plea of Not Guilty.

It appeared in evidence, that the Defendant gave notice to the Plaintiff, the Parson, of setting out his Tithe of wheat, in the Seven Acre field; and the Plaintiff sent his waggon to take it away by a private road which belonged to the Defendant, and which passed through the farm, and led to the field in which the Tithe was set out; but no person had a right to use that road, or pass over it without the Defendant's leave and permission, but it was used by his carts and waggons in the cultivation of his farm, as a road through the farm for all agricultural puposes: There was another road to get into this field, which was a public one, but it was more circuitous.

The Plaintiff's servant in his way to the field, where the Tithe was set out, was proceeding along this private way, when he found a gate locked, to prevent his proceeding by that way to the field

in

in question, which he broke open and took the Tithes. On his return another gate was locked, and he was thereby prevented from passing with the Tithes along the private road to the Parsonage, and carrying them away by that way; which was the obstruction complained of.

Lord Chief Baron MACDONALD told the Jury, That when there was a private road through a farm used by the owner of the land for agricultural and other purposes, the Parson had a right to use it for the purpose of carrying away his Tithes.

That it made no difference in the law, that the public road was but a little more circuitous than the private one, nor that the owner of the land carried his nine parts by another way; for this must happen in all instances, where the place to which the Clergyman intended to carry the Tithe lay in a different direction from the Farmer's barn.

He admitted that the owner of the road might shut it up, by planting trees, or any other such means, but he took the law to be clear, that as long as it continued to be a road used by the occupant of the farm, so long the Clergyman had a right to use it for that special purpose.

The Jury (a special one) found a verdict for the Plaintiff, but gave only a farthing damages, although the Tithe was proved to be worth 14*l.* and to have been totally spoiled.

Best, Serjt. and *Bosanquet* for the Plaintiff.
Garrow and *Bailey*, Serjt. for the Defendant.

Doe ex dem. Oldershaw *& Alt.* *v.* Breach.

If a Tenant holds under an agreement for a lease, which specifies the covenants to be inserted in the lease, with a right of entry, for a breach of them, an ejectment may be sustained on any breach, though no lease has ever been executed.

This was an action of Ejectment, brought to recover possession of certain Lands in the Parishes of *Chelsfield*, *Orpington*, and *St. Mary Cray*, in *Kent*.

The Plaintiffs were Trustees under the will of Sir *Richard Glode*, and had demised the Premises in question to the Defendant.

There had been no Lease executed, but an Agreement had been entered into between the parties for a Lease.

The Agreement specified what Covenants were to be inserted in the Lease; such as to pay rent; not to underlet; not to take three successive crops; not to cut trees, &c. &c. with a right of re-entry for breach of any of them.

The Ejectment was brought on this last clause of re-entry, for breach of several of the proposed Covenants, which the Plaintiff was preparing to prove, when—

Best, Serjt. objected to the Plaintiffs' right to recover, on the ground, That there could be only a forfeiture of a legal Estate, by reason of a breach of Covenant; and that it was therefore necessary to shew, that the Defendant was so possessed: that such an Estate only, could be subject to such covenants and conditions, and those be created by some legal instrument

instrument conveying such Estate; whereas the Defendant's Estate here was an equitable one only, conferred by the Agreement, no Lease having ever been executed, and the Defendant never having bound himself by Deed to the performance of any Covenants.

It was answered by the Plaintiffs' Counsel, That it had been decided in the case of *Doe ex dem. Bloomfield* v. *Smith*, 6 *East*, 530, That where a Tenant held under an Agreement for a Lease, that he should be deemed to hold subject to all the terms and conditions, which it was intended should form part of the Lease: That if a Lease had here been executed pursuant to the terms of the Agreement, there could be no doubt of the Lessors of the Plaintiffs' right to recover, there having been breaches of Covenant here clearly committed by the Defendant.

The Defendant's Counsel, in reply, observed, That the Agreement in *Doe* v. *Smith* applied to the duration of the term only, and not to any collateral Covenants.

Lord Chief Baron MACDONALD observed, That had it not been for the authority cited of *Doe* on the demise of *Broomfield* against *Smith*, he should have thought the objection a good one, the action of Ejectment being to recover a legal Estate; but that according to the abstract of the case as now shewn to him, he must consider it as decided upon the broad principle, that a Tenant in possession, by virtue of an Agreement for a Lease, must be considered as holding from year to year under the conditions, and upon the terms contained in the Agreement, and subject

ject to all the legal consequences of holding under such terms. Though the case of *Doe* v. *Smith* applied to the determination of the term only, that was the important part in every demise for a term of years, and if that was held to be governed by the terms of the Agreement, the Agreement must be equally operative as to all the other circumstances of the demise.

Considering himself, therefore, as bound by the authority of the law, that the several stipulations contained in the Agreement, respecting the holding, when reduced into a Lease, were the terms upon which the Tenant held the Land. He would not nonsuit the Plaintiff; but he would, however, give the Defendant leave to move on it if he thought fit.

The Plaintiff was afterwards nonsuited on the merits, so that the point was never moved.

Garrow, *Baily*, Serjt. and ——— for the Plaintiff.

Best, Serjt. and *Marryat* for the Defendant.

CASES

ARGUED AND RULED

AT NISI PRIUS

IN

EASTER TERM, 47 GEO. III.

SITTINGS AFTER TERM

AT GUILDHALL.

——— *v.* WESTMORE.

Under a Policy on a ship for a given time, while securely moored in a certain Harbour, she is warranted in changing her mooring within the same Harbour.

THIS was an action on a Policy of Insurance, on the ship *Hero*, during one month's remaining in *Portsmouth* Harbour, securely moored.

At the time the Policy was effected the ship was moored at *Portsmouth*, at a place called *Deep-water*. She was afterwards removed to *Beech-head*, where her bottom was cleaned and repaired, and afterwards she was put into dock at *Mark's* Wharf,

Wharf, and safely moored: while she was there an accidental fire broke out, and she was burned.

Upon this loss the action was commenced.

The *Attorney-General* objected, That the Plaintiff could not recover, this not being a loss within the terms of the Policy, which was on the ship while she remained moored in *Portsmouth* Harbour; whereas by shifting her position so often the risk was increased; nor was it to be supposed that all places were of equal security; and the Underwriter might have contemplated on the place where she lay when the Policy was effected, as a place of greater security than any other.

Lord ELLENBOROUGH said, That he was of opinion, the loss was within the terms of the Policy. It appeared to him, that the risk insured against did not require the continuity of the state in which the ship was when the Policy was effected, and that the terms of the Policy warranted a removal from place to place within the Harbour of *Portsmouth*; and that such a change of place must have been in the contemplation of the parties. The loss did not arise from any fault in the mooring of the vessel, but from another independent cause. And she had, during the whole time, remained in *Portsmouth* Harbour.

Verdict for the Plaintiff.

Park and *Williams* for the Plaintiff.

The *Attorney-General* for the Defendant.

CASES

ARGUED AND RULED

AT NISI PRIUS.

IN

TRINITY TERM, 47 GEO. III.

SITTINGS AFTER TERM

AT WESTMINSTER.

BULLEN *v.* ANSLEY and SMITH, Sheriffs of London.

THIS was an action against the Defendants, for money had and received, paid, laid out, and expended, &c.

The Sheriff is entitled to his poundage on an Execution levied, though that Execution is afterwards set aside for irregularity.

Plea of *Non-Assumpsit.*

The action was brought to recover the sum of 78 *l.* under the following circumstances:—

One —

One *Emmett* having become indebted to the Plaintiff, he had obtained a Judgment against him, upon which he sued out a Writ of *fieri facias* to levy the amount on the goods and chattels of *Emmett*.

The Execution was executed, and the sum levied, the poundage upon which amounted to 78 *l.* which was the sum in dispute.

The Execution had been, in fact, irregular, and a rule having been obtained to set it aside, and that the money levied should be restored to *Emmett*; that rule was made absolute, and the money levied ordered to be restored to *Emmett*.

The Sheriffs had, however, retained the 78*l.* the poundage on the sum levied; and the Plaintiff, having paid to *Emmett* the whole amount of the sum levied on his goods, now brought the action to recover from the Sheriffs the 78*l.* so retained by them.

Upon opening the case, Lord ELLENBOROUGH declared his opinion, That the Plaintiff had no title to recover; That the Sheriffs, having regularly levied under the authority of the Writ of Execution, had nothing to do with the regularity or irregularity of the proceding under which that Writ had issued; that was the act of the party himself, by whom it was sued out: the authority of the Writ the Sheriffs could not question, but was bound to obey. He had, therefore, paid proper obedience to the Writ, and the Statute having given to him certain fees for his trouble as poundage, he was legally entitled to those fees on account of his levy.

The

The Plaintiff submitted to be nonsuited.

Topping and *Lambe* for the Plaintiff.
The *Attorney-General* for the Defendants

IN THE COMMON PLEAS.

SITTINGS AFTER TERM
AT GUILDHALL.

FOUNTAIN, Administrator, *v.* YOUNG.

ASSUMPSIT for Meat sold by the Plaintiff's Intestate to the Defendant.

Plea of *Non-Assumpsit.*

The Plaintiff's Counsel called a witness to prove an admission of the debt by the Defendant, in a conversation which he had had with him respecting it.

The witness, at the time of the conversation stated, said, That he had been sent for by the Defendant,

A person to whom a party, supposing him to be an attorney, makes confidential communications respecting his cause, is bound to give evidence of them, if called as a witness, attornies only being so privileged as to not being bound to disclose the secrets of their clients.

fendant, to consult with him as to his defence, the Defendant supposing him to be an attorney. He was, in fact, at that time, clerk of the papers in Newgate, but had been formerly clerk to an attorney.

He admitted that he had been so sent for by the Defendant, under the impression that he was an attorney, and the communication was so confidentially made.

Onslow, Serjt. for the Defendant, objected to his examination; That if he had been an attorney there could be no doubt he could not be examined as to the facts so communicated to him; and he contended that a similar privilege was extended to all confidential communications made to any person professing to act as an attorney, to whom the party had disclosed his affairs under a *bona fide* impression of the person's professional character.

It was answered by *Shepherd*, Serjt. That there was no such privilege, except in the case of attornies. It was the business of the party to confine his communications to his regular attorney only, who was not bound to disclose what his client had informed him of, respecting his case, but other persons were bound by their oath to speak to all matters within their knowledge.

Sir JAMES MANSFIELD, Chief Justice, said, The rule of law, which protected clients from having their confidential communications respecting their cases given in evidence, was confined to the cases of the party's attorney only, and there was no such privilege extending to other persons circumstanced

stanced as the witness was. He should, therefore, be examined in chief.

He was so, and the Plaintiff had a Verdict.

Shepherd, Serjt. and *Puller* for the Plaintiff.

Onslow, Serjt. for the Defendant.

END OF TRINITY TERM.

CASES

ARGUED AND RULED

AT NISI PRIUS

IN

MICHAELMAS TERM, 48 GEO. III.

Dec. 4, 1808.

AMEY *v.* LONG.

A person in possession of any paper, who is served with a subpœna, *duces tecum*, is bound to produce it, whether the paper belongs to him or not.

THIS was an action on the case.

The Declaration stated, That the Plaintiff had sued out a Writ of *fieri facias*, indorsed to levy on the goods of one *Samuel Glover*, directed to the Sheriff of *Surry*, and upon which he had returned *nulla bona*: That an action was brought against the Sheriff for a false return thereon: That it became necessary to produce the Warrant to levy under such *fieri facias*: That the Defendant, who was an Officer of the Sheriff of *Surry*, had been subpœnaed

subpœnaed as a witness on such trial, with notice to produce the Warrant whereon such levy was to be made: That he did not produce such Warrant, by reason whereof the Plaintiff was nonsuited, and forced to pay costs, &c.

The Plaintiff produced office copies of the Judgments in the original action of *Amey* v. *Glover*, and that of *Amey* v. *Smith*, Sheriff of *Surry*. In the former the Judgment was stated to be against *Samuel Glover*, jun.

This was objected to as a variance.

Lord ELLENBOROUGH said, That as there was but one action, there was no ambiguity; if there had been another cause of the same name it might be fatal.

The subpœna had been directed to *Long* and *Grace*, and they were called upon by it to produce their, or either of their Warrants, and all papers, &c.

The Warrant had been directed by the Sheriff to *Grace* only; *Grace* had no house, but *Long* had a Lock-up-house, and it was used by *Grace*, who brought to it such persons as he arrested. A person who had been arrested by *Grace*, and locked up at *Long*'s house, saw on a file there, the Warrant in question.

A witness also swore, That he had a conversation with the Defendant, and asked him, Why he did not produce the Warrant? that he did not deny having it, but said he would nonsuit the Plaintiff in this action as he had done in the other.

The *Attorney-General,* for the Defendant, contended, That the action could not be supported against *Long,* who was not the Officer entrusted with the execution of the Warrant: he had no title to the possession of it; it belonged to *Grace,* to whom it had been directed. The action had been against the Sheriff for a false return; and it was necessary to connect him with his Officer; that was done by the intervention of the Warrant; *Long* had no legal possession of it, as it was not addressed to him; and as to its being seen on the file, that gave no right to take it off and produce it, it was *Grace's,* not his Warrant.

Lord ELLENBOROUGH. The person who filled up this subpœna filled it up against both *Grace* and the Defendant *Long,* supposing that the Warrant might be in *Long*'s possession, though legally belonging to *Grace.* If the Defendant had the Warrant he was bound to produce it. He was bound to obey the subpœna, however he might have come by the possession of the paper; there is evidence to shew that at one time he had it in his possession. The question is, whether he had the Warrant in his custody, and then could have produced it; that was for the Jury to say.

Verdict for the Plaintiff.

Park, Marryat and *Pell* for the Plaintiff.

Attorney-General and *Garrow* for the Defendant.

IN THE COMMON PLEAS.

SITTINGS AFTER HILARY TERM AT WESTMINSTER.

HONEYWOOD *v.* SIR W. GEARY. *Feb.* 1808.

A Member of a Committee, who conducts an Election for a Candidate for a seat in Parliament, is such an agent as shall bind his Principal by which he acts.

THIS action was brought to recover from the Defendant a sum of money claimed to be due under the following circumstances.

In 1802 Sir *Edward Knatchbull*, Sir *W. Geary*, and Mr. *Honeywood* were candidates for the County of Kent; on the 15th of July Mr. *Honeywood* had a considerable majority, so much so that his election was deemed to be sure; Sir *W. Geary* was lowest on the poll.

A proposition was made by a friend of Mr. *Honeywood*, (Mr. *Leigh*), to Mr. *Larkins*, who was at the head of Sir *W. Geary*'s Committee, that Sir *W. Geary* should have the benefit of Mr. *Honeywood*'s second votes, if he would contribute to the expence. It was then stated, that the proposition had been agreed to; that he had had such second votes, and by the effect of them finally succeeded; and the action was for the share of the expenses.

Mr. *Leigh* was called, and was about to state what passed between him and Mr. *Larkins*, respecting

specting the agreement for a junction of interest, and Mr. *Larkins's* undertaking, on the part of Sir *William Geary*, to contribute to the expences.

Best, Serjt. objected, That such conversation should not be given in evidence; no direct communication with Sir *William Geary* himself was proved: he might have delegated a power to his Committee to enter into such an agreement, but the Committee constituted one body, and any orders to bind him should be the act of the majority of the Committee; this was the act of Mr. *Larkins* only, and could not be obligatory either on the Committee at large, or on Sir *William Geary*.

Shepherd, Serjt. contended, That each Member of the Committee had authority; they were delegated by Sir *W. Geary* to act for him. He cited, from *Clifford*'s Reports of the Southwark Election, a case before Lord Kenyon of the *Tewkesbury* Election, in which evidence of the acts of Mr. *Smith*, an agent, was admitted by Lord Kenyon to bind the Candidate. Here Mr. *Larkins* was the agent of Sir *William Geary* confessedly: he was the Chairman of the Committee; he gave orders for every part of the conduct of the Election, which he should prove.

Evidence to that effect was given.

MANSFIELD, Ch. J. after observing, That it had been proved that the Committee had full authority to act for Sir *W. Geary*; that they had ordered chaises, and gave general orders respecting the Election, which Sir *W. Geary* adopted and had the benefit of;—he should, therefore, hold Sir

W. Geary

W. Geary bound by an Agreement so made by *Mr. Larkins*, acting in that capacity. He therefore admitted Mr. *Leigh* to be examined.

Verdict for the Plaintiff.

Shepherd, Runnington, Serjts. and *C. Runnington* for Plaintiff.

Best and *Vaughan*, Serjts. for the Defendant.

SITTINGS AFTER TRINITY TERM, 1808.

AT GUILDHALL.

YOUNG & BARLEY *v.* SMITH & PHILLIPS, Sheriffs of London.

An admission respecting his debt, made by the petitioning Creditor, is admissible evidence in an action in which the validity of the Commission of Bankruptcy comes in question.

THIS was an action of Trespass on the case, against the Defendants, as Sheriffs, for a false return.

The Declaration stated the issuing of a *fieri facias* against one *John Tenant*, at the suit of the Plaintiffs, under which the Defendants had entered: That *Tenant* had goods, which the Defendants had taken in execution, and yet had falsely returned *nulla bona*.

The goods had been taken in execution by the Sheriffs on the 20th of November, 1807.

On

On the 20th of November a Commission of Bankruptcy had issued against *Tenant*, and the defence relied upon was, that the Bankruptcy overreached the time of the levy.

The Act of Bankruptcy was proved to have taken place on the 4th of November.

The principal point in dispute was, whether a good petitioning Creditor's debt existed at that time, sufficient to support the Commission.

The debt was a sum of 208 *l.* claimed to be due to *Stein, Smith* and *Co.* who were Distillers, for Gin sold to *Tenant*, who was a Liquor-dealer, and which was proved to have been delivered to *Tenant* in the September preceding.

No evidence was given as to the Gin having been sold on credit, and the petitioning Creditor's debt, therefore, stood as a debt for goods sold and delivered, due upon the delivery of the goods.

To answer this, and to shew that at the time of the Act of Bankruptcy committed, the debt claimed by *Stein* and *Co.* was not a good petitioning Creditor's debt to support the Commission, it was relied on for the Plaintiff, that the goods had been sold on credit, and that the credit had not then expired. To establish that fact—

The Plaintiff's Counsel called a witness to prove a conversation between himself and *Smith*, one of the petitioning Creditors, in which *Smith*, in an answer to a question put by the witness, as to the Gin having been sold at three months credit, admitted the fact, that it was sold at three months credit.

The

The three months had not expired on the 4th of November.

It was objected, that what was said by *Smith* was not admissible; he was petitioning Creditor, but he was not a party in this suit, and that what was said by one who was not on the record, was not evidence.

Sir J. MANSFIELD, Chief Justice, said, He had no doubt that the admission of the petitioning Creditor, as to any fact respecting his debt, was good evidence.

He admitted the evidence, and the Plaintiff had a Verdict.

Shepherd and *Vaughan*, Serjts. and *'Espinasse* for the Plaintiffs.

Best and *Onslow*, Serjts. and *Scarlet* for the Defendants.

END OF TRINITY TERM, 1808.

CASES

ARGUED AND RULED

AT NISI PRIUS,

ON THE

HOME CIRCUIT.

MAIDSTONE SUMMER ASSIZES, 1808.

Coram LORD ELLENBOROUGH, CH. JUSTICE.

The KING v. HOWE.

The conviction of a person before a Justice of the peace, of obstructing Officers, in which the evidence given is set out, cannot be given in evidence to contradict what is sworn by a witness at the trial as to what he swore before the Justices.

THIS was an information against the Defendant for obstructing a Sheriff's Officer in the execution of his duty.

Plea of Not Guilty.

Evidence was given by the Officer of the obstruction, and he swore to the person of the Defendant as being the person who was guilty of it.

The

The defence was an *alibi*.

A witness was called for the Defendant to support it.

Howe, the Defendant, had been convicted of the obstruction before two Magistrates in the penalty of 100 *l*. and the same witness, who was now produced for the Defendant, had been examined before the Justices.

The record of the conviction was produced in Court.

On his cross-examination, he was asked as to what he had sworn before the Justices? This was done with a view, and for the purpose of contradicting him, by the production of the Record of the conviction, as it set out the evidence as given before the Justices on the conviction of *Howe*.

It was proposed by the Counsel for the Prosecution to give the Record of the Conviction in evidence to contradict what he then had sworn.

Lord ELLENBOROUGH said, He would admit the Record of the conviction to be given in evidence, to prove that such a proceeding had taken place, but not to contradict the testimony given by the witness. Persons who were before the Magistrates should be called to prove on oath what there took place. The conviction itself, for the purpose proposed, was therefore inadmissible, and he rejected it *.

Shepherd

* *Sittings after Michaelmas Term*, 1790, *at Guildhall.*

REX *v.* AKERS.

Information against the Defendant for obstructing a Custom-house Officer in the execution of his duty.

Per Lord Kenyon. The Defendant's Counsel have no right, nor shall they

Shepherd, *Bolland* and *C. Runnington* for the Prosecution.

The *Common-Serjeant* and *Gurney* for the Defendant.

they be permitted to enquire the name of the person who gave the information of the smuggled goods.

A question having arisen as to the Defendant's right to go into the question of, Whether the goods were smuggled or not?

Per Lord Kenyon. Where the Officers have an information of smuggled goods, which affords a probable ground to warrant the search, persons obstructing them in their search, or in the discharge of their duty, are liable to an information for the obstruction, whether smuggled goods are found or not. But the Officers search at their peril.

PEARSON *v.* HUTCHISON.

In an action on a Promissory Note, the holder is not bound to take an Indemnity if the Note has been lost.

THIS was an action on a Bill of Exchange by the Indorsee against the Acceptor.

The Bill was stated to be lost, and the Plaintiff had offered the Defendant an Indemnity, which the latter had refused.

This was offered at the trial as a reason for its non-production, but no proof of the actual loss was offered.

Lord ELLENBOROUGH, C. J. was of opinion, That the Plaintiff could not recover. His Lordship said, If the Bill was proved to have been destroyed, he would admit parol evidence of it. It had been laid down by Mr. Justice *Buller*, in a criminal case, an

an indictment for forgery, in which case the prisoner was proved to have swallowed the note on which the forgery was imputed, that parol proof of it was admissible evidence.

Here the instrument being negotiable it might have passed into other hands, and the Defendant would remain liable, and might be called upon to pay it over again.

But it was said that an Indemnity was offered, and this brought it to the question of Indemnity, whether the Defendant was bound to accept it; as to that he was of opinion, That no one was bound to accept of it, as he would remain liable to an action on the Bill, to which he would have no defence, and then be forced to have recourse to his Indemnity.

Bolland cited an authority from *Marius*, That the Acceptor ought to pay where the Bill was lost. But the Chief Justice thought it could not be relied on, and that such a construction would be productive of much inconvenience, if taken in so general a way.

Plaintiff nonsuited.

Attorney-General and *Bolland* for the Plaintiff.
Garrow for the Defendant.

CASES

ARGUED AND RULED

AT NISI PRIUS;

IN

MICHAELMAS TERM, 50 GEORGE III.

AT WESTMINSTER.

Nov. 29. GOODTITLE *ex d.* PINSENT *v.* LAMMIMAN.

EJECTMENT to recover the possession of a Baker's Shop and Cellar, demised by the Lessor of the Plaintiff to the Defendant.

The premises were described in the Declaration as "situate, lying, and being in the united Parishes of *St. George* the *Martyr*, and *St. George Bloomsbury*."

A Witness

A Witness being asked where the premises were situate? said they were in the Parish of *St. George, Bloomsbury.*

This being objected as a ground of nonsuit,—It was answered that the Parishes were united by Act of Parliament, and that the premises were therefore rightly described in the Declaration.

It was answered, That this was for the purpose only of jointly supporting the poor, and for no other purpose

Lord ELLENBOROUGH said, It was certainly so; That for all other purposes they were distinct Parishes; and nonsuited the Plaintiff.

Wigley for the Plaintiff.
Garrow and *'Espinasse* for the Defendant.

STILK *v.* MEYRICK.

A promise by the master of a vessel of an advance of wages to a sailor, for extra work during the voyage is void.

THIS was an action brought by the Plaintiff, a private sailor, to recover the amount of his wages, on a voyage from *London* to the *Baltick* and back.

The sum claimed was partly for monthly wages, according to articles which he had signed, and a further sum claimed under these circumstances.

Two sailors, part of the crew, had deserted the ship, and the master (the Defendant), not being able to supply their places at *Cronstadt*, promised to divide among the crew, in addition to their wages, the wages due to the two men who had deserted.

Upon this being claimed, it was objected, That any engagement by the master for a larger sum than was stipulated for by the articles was void, and the case of *Harris* v. *Watson*, *Peake* N. P. Cases, p. 72, cited.

It was answered, That this case was very different from the case cited: That this engagement was made before the ship sailed on her voyage home; it was made under no coercion, from the apprehension of danger, nor extorted from the Captain; but a voluntary offer on his part for extraordinary service.

Lord ELLENBOROUGH ruled That the Plaintiff could not recover this part of his demand. His Lordship said That he recognized the principle of the case of *Harris* v. *Watson* as founded on just and proper policy. When the Defendant entered on board the ship, he stipulated to do all the work his situation called upon him to do. Here the voyage was to the *Baltick* and back, not to *Cronstadt* only; if the voyage had then terminated, the sailors might have made what terms they pleased. If any part of the crew had died, would not the remainder have been forced to work the ship home? If that accident would have left them liable to do the whole work without any extraordinary remuneration, why should not desertion or casualty equally demand it?

Verdict for the monthly wages only.

Attorney-General and *'Espinasse* for Plaintiff.
Garrow for the Defendant.

CASES

CASES

ARGUED AND RULED

AT NISI PRIUS,

IN

HILARY TERM, 1810.

SITTINGS AFTER TERM AT WESTMINSTER.

PRIDE *q. t.* v. STUBBS.

DEBT to recover the Penalty given by Statute *5 Eliz.* for following a trade, not having served an apprenticeship.

The trade was that of a Coachmaker.

It was objected, That this Statute only operated on such trades as were in use at the time of the Statute being passed.

Lord ELLENBOROUGH assented, and nonsuited the Plaintiff, saying, That the trade of a Coachmaker was not one in use at the time of Queen *Eliz.*

Garrow and *Lawes* for the Plaintiff.

Park and *Selwyn* for the Defendant.

CASES

ARGUED AND RULED

AT NISI PRIUS,

ON THE

HOME CIRCUIT.

MAIDSTONE LENT ASSIZES, 1810.

Coram LORD CHIEF BARON MACDONALD.

YATES *v.* LANCE.

Where an action is defended by an order of Vestry, and the expences ordered to be defrayed out of the Poors' Rates, which cannot legally be done; a Parishioner who only meant to submit to pay the rate, and not otherwise to contribute, is a good witness.

TRESPASS.

Justification under a right of way claimed as a public Highway. The way claimed as a public one, was in the front of the Ship Tavern, at Greenwich, under a Colonade, and leading by steps down into the river.

The Plaintiff was the proprietor of the Ship Tavern.

The

The action was defended by an order of Vestry, and by a resolution of the Vestry, the expences were to be defrayed out of the Poors' Rates.

A Witness was called for the Defendant.

Marryat asked him on his *voire dire*, Whether he was not a Parishioner and paid rates; and whether he was not present at the Vestry when the expences of the action were ordered by a resolution of Vestry to be defrayed out of the Poors' Rates?

Having answered in the affirmative, He objected to him as interested.

It was answered, That no such appropriation of the Poors' Rates could legally be made, and therefore he was under no legal obligation to pay; and being asked whether in case he was not bound by law to pay the Rates made for the purpose of defending the cause, he meant to contribute out of his own pocket?

He said he did not.

The Lord Chief Baron held him to be admissible, saying, There could be no such appropriation of the Poors' Rates, of course he could not be bound to contribute in that shape; and he had refused to be bound in any other way; he had not therefore an interest sufficient to render him incompetent.

Garrow and *Marryat* for the Plaintiff.

Best, Serjt. and *Pooley* for the Defendant.

KINGSTON LENT ASSIZES, 1810.

STRINGER *v.* MARTYR, ESQ.

Trespass against a Justice of Peace for taking goods under his warrant, and tenders amends. If the notice of action only claims goods to the value of the sum tendered, and it is admitted, Defendant must have a Verdict.

TRESPASS for taking Plaintiff's goods.

Defendant pleaded that he was a Justice of Peace, that the goods were taken under a Warrant on a Distress for Poors' Rates, and tendered 40*s.* amends under Statute *James* I.

The tender was admitted by the Replication.

The Plaintiff put in the notice of action under the Statute of *George* the Second, which was in these words:

"You having on or about the 10th day of November, 1809, seized and taken, and caused to "be seized, and taken certain goods and chattels; "to-wit, ten pewter dishes, the property of *William Stringer*, being of a certain large value, "to-wit, the value of 2*l.* and carried away the same "from and out of a certain Messuage and Dwelling-house of the said *William Stringer*, situate "and being in the Parish of the *Holy Trinity* of "*Guildford*, but without the bounds of the Corporate Jurisdiction of the Town of *Guildford*, "and having afterwards sold and disposed of the "same; I do therefore give you notice that an "action will be commenced for the same.

"Signed by Plaintiff's Attorney."

Upon

Upon the notice being read, *Best*, Serjt. objected, That upon this notice there must be a verdict for the Defendant: That the tender being of 2*l.* and the Replication having admitted the value of the pewter dishes to be 2*l.* though laid under a viz. the Plaintiff could not go beyond 2*l.* though the Jury could give less; the sum tendered therefore covered the Trespass, and was by the Plaintiff's own shewing sufficient amends.

Garrow, for the Plaintiff, contended, That the taking of the dishes was not the only Trespass complained of, it was also for taking them out of his Dwelling house; so that there was a Trespass as to the house, which would not be covered by the 2*l.* tendered, which applied to the goods only.

The Lord Chief Baron, after referring to the notice, Was of opinion that the Trespass complained of, applied to the goods only; the part respecting the house being the place only where they were taken, and not a distinct Trespass; and that the Plaintiff having admitted the tender, and by the notice having limited the value of the goods lost to 2*l.* could claim no more; and that it was covered by the tender.

The Plaintiff was nonsuited.

Garrow and *Marryat* for the Plaintiff.
Best, Serjt. for the Defendant.

ESSEX SUMMER ASSIZES, 1810.

Coram LORD ELLENBOROUGH, CHIEF JUSTICE.

July, 1810.

REX *v.* GREAT CANFIELD.

An indictment for not repairing a road, must describe a direct road.

THIS was an indictment against the Parish of *Great Canfield*, for not repairing a Road.

The indictment stated that there was, and from time to time, whereof the memory of man was not to the contrary, had been a certain public King's Highway, leading from *Great Dunmow*, in the County of *Essex*, to the village of *Little Canfield*, and from thence to the village of *High Roothings*, in that County; and for all the King's subjects to pass and repass, &c.; and then and there averred that divers, to-wit, 120 perches of the said Road, leading from &c. to &c. was ruinous, and out of repair.

There was a direct Road from *Dunmow* to *Little Canfield*, but the Road which lead to *High Roothings* and which was the Road indicted, turned off from the Road leading from *Dunmow* to *Little Canfield*, a quarter of a mile before you came to *Little Canfield*; so that to follow the Road as laid in

in the indictment, a person must in going to *Little Canfield* pass by the Road leading to *High Roothings*, and having gone to *Little Canfield*, return a quarter of a mile back again to get into the Road from *Little Canfield* to *High Roothings*, as laid in the indictment.

It was objected by Defendant's Counsel, That this was a fatal variance in the description of the Road indicted. That the indictment charged that the Road led from *Great Dunmow* to *Little Canfield*, and from thence to *High Roothings* by the Road indicted; whereas, in fact, he must turn back a quarter of a mile from *Little Canfield*, before he could get into the Road indicted.

Lord ELLENBOROUGH said, That the description of the Road meant a direct communication from *Great Dunmow* to *High Roothings*, through *Little Canfield*; and as it appeared that a person who went from *Dunmow* to *Little Canfield* must turn back a quarter of a mile from *Little Canfield* before he got into the Road indicted, the variance was fatal, and the Defendants entitled to an acquittal. The Road indicted did not lead from *Canfield* and *Dunmow*, but from the middle of the Road which led from one to the other.

The Defendants were acquitted.

Best, Serjt. and *Poolcy* for the Prosecutors.

The *Common Serjeant* and *'Espinasse* for the Defendants.

MAIDSTONE SUMMER ASSIZES, 1810.

STEARS v. SMITH, Clerk.

If an action is brought against a Justice of Peace, and notice given under Statute 22 Geo. II. and signed by the Attorney for the Plaintiff, describing himself as of London, if in fact it is in Westminster, it is fatal.

THIS was an action of Trespass against the Defendant, who was a Justice of Peace for the County of Kent, for breaking and entering the Plaintiff's house, and searching it without authority, and injuring his goods.

The Plaintiff put in the notice pursuant to the Statute 22 *Geo.* II.

The notice was Signed *John Spencer Young*, Attorney for Plaintiff, *New Inn, London*; that being the description of his place of residence, as required by the Statute.

It was objected, That *New Inn*, where the Attorney lived, (it being ascertained to be *New Inn*, near *St. Clement's*,) was in *Westminster*, and not in *London*; and that, therefore, there was a misdescription of the Attorney's residence.

Lord ELLENBOROUGH ruled the objection to be sufficient, and Plaintiff was nonsuited.

Best, Serjt. and *Espinasse* for the Plaintiff.
Garrow for the Defendant.

INDEX.

A

Account.

WHERE parties, having cross demands, settle and balance accounts, though part of the Plaintiff's demand was for which no action could be supported, the settlement of the accounts shall bind the Defendant, so that he cannot set up the defence to an action for the balance. *Dawson* v. *Remnant.* *Page* 24

Agent.

1. An affidavit of an agent cannot be used to prove a fact against the principal, where he cannot himself be called, but the principal has used an affidavit of the agent in an application to the court, in which a particular fact is stated, the affidavit of the agent may be used as evidence. *Johnson* v. *Ward.* 47
2. An agreement entered into by one of the committee on an election shall bind the candidate. *Honeywood* v. *Sir W. Geary.* 119

Agreement.

If a tenant holds under an agreement for a lease, which specifies the covenant to be inserted in the lease, with a right of entry for breach of them, an ejectment may be sustained on any breach, though no lease has ever been executed. *Doe ex dem. Oldershaw* and *Alt.* v. *Breach.* *Page* 106

Annuity.

Where an annuity has been granted for a sum paid as a consideration for it, that is, money had from the time of the grant, if the annuity is at any subsequent time set aside, and where the grantor became bankrupt after the grant, but subsequent to its being set aside, it is barred by his certificate. *Walker* v. *Lescarry.* 98

Apprentice.

Where an apprentice is bound for five years, and a bond given conditioned for his service, the binding being void under the stat. 5 Eliz. as not being for seven years, the bond is also void. *Burney* v. *Jennings.* 8

Attorney.

1. If a Defendant, being sued, pays the Plaintiff, after the writ is sued out, the money without discharging

discharging the costs, the attorney may proceed in the cause notwithstanding. *Toms* v. *Powel.* *Page* 40

2. A person to whom a party, supposing him to be an attorney, makes confidential communications respecting his cause, is bound to give evidence of them, if called as a witness, attorneys only being so privileged as to not being bound to disclose the secrets of their clients. *Fountain*, administrator, v. *Young.* 113

B

Banker.

If a bill is accepted, the person who takes the bill does it under all the terms of acceptance, and therefore if made payable at a banker's it must be demanded within banking hours. *Parker* v. *Gordon.* 41

Bankrupt.

1. If a trader, against whom a commission of bankruptcy has issued, has acquiesced in it so far as to go to the different creditors to solicit them to vote for particular persons as assignees, he cannot afterwards question the commission in an action for money had and received against those persons, whether he is an object of the bankrupt laws or not. *Like* v. *Howe* & *Rogers.* *Page* 20

2. A debt of 100*l.* for goods sold on credit will not support a commission of bankrupt until the credit expires, if a bill is given for them; but if sold on the terms of giving a bill at two months, and no bill is in fact given, a commission on such a debt cannot be supported. *Hoskins*, assignee of *Deighton*, a bankrupt, v. *Duperoy.* 55

3. If a person, against whom a commission of bankrupt issues, acquiesces in it so far as to take a part in the sale of his own effects under the commission, he shall not afterwards be allowed to question it. *Clarke* v. *Clarke* and *Brown.* 61

4. Where an annuity has been granted for a sum paid as a consideration for it, that is, money had and received from the time of the grant, if the annuity is at any subsequent time set aside, and where the grantor became a bankrupt after the grant, but subsequent to its being set aside, it is barred by his certificate. *Walker* v. *Lescarry* 98

5. An admission respecting his debt, made by the petitioning creditor, is admissible evidence in an action where the validity of the commission of bankruptcy comes in question. *Young* and *Barly* v. *Smith* and *Phillips.* 121

Bastard.

Where the father of a bastard child, against whom an order of filiation had been made, paid several sums on that account to the parish, and during all that time for which he paid the child had been in the Foundling Hospital, and the parish put to no

no expence, he may recover it back. *Hodgson* v. *Williams*. *Page* 29

Bill in Equity.

Depositions taken under an old commission may be admitted without producing the commission, as it may be presumed to be lost, *aliter*, where under a recent one the bill and answer need not be produced. *Bayley* and *Alt.* v. *Wylie*. 85

Bill of Exchange.

1 When three persons undertake to accept bills for a particular concern, and the drawer draws bills on account of one of them only, and not for the particular concern; and he accepts in the name of the three, such bill cannot be recovered by a *bonâ fide* holder who received it from the drawer against the other two. *Williams* v. *Thomas Hunter* and others. 18

2. If a bill is accepted, the person taking the bill does it under all the terms of acceptance, and therefore if made payable at a banker's, it must be demanded within banking hours. *Parker* v. *Gordon*. 41

3. In an action by the indorsee of a bill of exchange, where several indorsements have taken place which are laid in the declaration, though necessary to be proved in general, yet if the defendant applies for time to the holder, and offers terms, it is an admission of the holder's title, and a waiver of proof of all the indorsements, except the first. *Bosanquet* v. *Anderson*. *Page* 43

4. An indorsement on a bill of exchange in these words: "Pay the contents of the bill to A B, being part of the consideration in a certain deed of assignment, executed by the said A B to the indorser and others," is not a limited indorsement. *Potts* v. *Reed*. 57

5. If Defendant to a debt, otherwise bound by the Statute of Limitations, admits the debt, but claims to be discharged by a written instrument, but which being referred to, does not amount to a legal discharge, he shall be bound by the admission, and the case thereby taken out of the Statutes. *Partington* v. *Butcher*. 66

6. It is a good defence to an action on a bill of exchange, that it is not produced or shewn to be lost or destroyed, though the party promised to pay it. *Powel* v. *Roach*. 76

7. In an action on a promissory note, the holder is not bound to take an indemnity if the note has been lost. *Pearce* v. *Hutchinson*. 126

Bond.

Where an apprentice is bound for five years only, and a bond given conditioned for his services, the binding being void under the Statute 5 Eliz. as not being for seven years, the bond is also void. *Burney* v. *Jennings*. 8

Broker.

The broker who made the distress is not an admissible witness for the Defendant unless released. *Field* v. *Mitchell.* *Page* 73

C

Case (Action on).

1. If a person employs a tradesman to do any work for him, and in the execution of it the trader, by his negligence, causes any injury to any one, the person employing him is liable for the injury arising from such neglect. *Sly* v. *Edgley.* 6
2. If the daughter of a person performs all the duties of a servant, all domestic offices in her father's house, though she does not actually sleep in the house, is seduced, the father may support an action *per quod servitium amisit.* *Mann* v. *Barrett.* 32
3. Case will not lie for taking an excessive distress, where one thing only could be taken, though greatly exceeding in value the amount of the distress.

Express malice not necessary to be proved to support the Defendant. *Field* v. *Mitchell.* 71

Contract (Illegal one).

Where parties, having cross demands, settle and balance their accounts, though part of the Plaintiff's demand was for which no action could be supported, the settlement of the accounts shall bind the Defendant, so he cannot set up that defence to an action for the balance. *Dawson* v. *Remnant.* *Page* 24.

Conviction.

1. Where a person is convicted under Stat. Geo. 3. chap. 80, and a warrant issued to levy his goods, the magistrate may order him verbally to be kept in custody until a return is made on the warrant. *Still* v. *Walls* and *Harris.* 36
2. The conviction of a person before a Justice of the Peace of obstructing officers, in which the evidence given is set out, cannot be given in evidence to contradict what is sworn by a witness at the trial, as to what he swore before the Justices. The *King* v. *Howe.* 124

Court-Martial.

An action will not lie against a Member of a Court martial for observing on the conduct of a Prosecutor as malicious and injurious to the service, and making that part of the sentence acquitting the officer tried by such Court-martial. *Jekyll* v. Sir *John Moore.* 63

Creditor.

In an action by an executor or an administrator for a debt due to the intestate, a creditor of the intestate is a good witness to prove it. *Paull,* administrator of *Sutton* v. *Brown.* 34

Demurrage

D

Demurrage.

If a person receives goods from on board ship, which are shipped to the shipper's order, or his assignees, paying freight with a certain allowance for demurrage, he makes himself, by acceptance of goods, liable to all the terms of the bill of lading, and of course to demurrage.
Dobbin v. *Thornton.* *Page* 16

Depositions.

1. Depositions taken in an action on a policy of insurance of the Captain, who is also part owner, where the loss is imputed to his misconduct, are not evidence.
Taylor v. *M'Vicar.* 27
2. Depositions taken under an old commission may be admitted without producing the commission, as it may be presumed to be lost, *aliter* where under a recent one, the bill and answer need not be produced. *Bayley* and *Als.* v. *Wylie.* 85

Distress.

Case will not lie for taking an excessive distress, where one thing may only be taken, though greatly exceeding in value the amount of the distress.
Express malice is not necessary to be produced to support the Defendant. *Field* v. *Mitchell.* 71

E

Ejectment.

1. Agreement for a demise for a year, the rent to be paid weekly, and to have a month's warning if no default was made in payment of the rent, but which agreement the lessor afterwards refuses to execute, and the tenant pays his rent weekly. He is entitled to a month's notice to quit, though the agreement was not executed, and although if a weekly tenant, a week's notice was good. *Doe ex dem.* *Peacock* v. *Raffer.* *Page* 4
2. If a tenant comes in the middle of a quarter, and afterwards pays for the time to the beginning of a succeeding regular quarter, from which time he pays half yearly, his tenancy commences from that regular quarter-day to which he paid up. *Doe ex dem.* *Holcomb* v. *Johnson.* 10
3. A notice given on the 25th of September to quit at the end of six calendar months, is good to determine a holding, commencing on the 25th of March.
Howard v. *Wemsley.* 53
4. If a notice to quit is directed to the tenant by a wrong Christian name, and he keeps it, it is a waiver of the misdirection, and the lessor may recover on it, if there was no other tenant of the name. *Doe* v. *Spiller.* 70
5. If a tenant holds under an agreement for lease, which specifies the covenants to be contained in the lease, with a right of

of entry, for a breach of them, an ejectment may be sustained on any breach, though no lease has ever been executed. *Doe ex dem. Oldershaw* and *Alt.* v. *Breach.* 106

6. If parishes are united for parochial purposes, if an ejectment is brought it must be laid in the parish where it really is situated. *Doe ex dem. Pinsent* v. *Lammiman.* *Page* 128

Election.

An agreement entered into by one of the committee on an election shall bind the candidate. *Honeywood* v. Sir *W. Geary.* 119

Evidence.

1. An unstamped agreement may be evidence of an holding. *Doe ex dem. Peacock* v. *Raffan.* 4

2. Depositions taken in an action on a policy of insurance of the Captain, who is also part owner, where the loss is imputed to his misconduct are not evidence. *Taylor* v. *M'Vicar.* 27

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4. An affidavit of an agent cannot be used to prove a fact against his principal when he can himself be called; but where the principal has used an affidavit of the agent in an application to the Court, in which a particular fact is stated, the affidavit of the agent may be used as evidence of that fact. *Johnson* v. *Ward.* *Page* 47

5. A parol evidence is admissible to shew the day on which a trial at *Nisi Prius* takes place. *Thomas* v. *Ansley* and *Smith.* 80

6. If a person says, I'll pay you money if A B says it is due, and A B being applied to, says it is due, but is dead at the time the action is brought, what he had said respecting the said debt is evidence. *Daniel* v. *Pitt.* 74

7. It is a good defence to an action on a bill of exchange, that it is not produced, or shewn to be lost or destroyed, though the party promised to pay it. *Powel* v. *Roach* and *Alt.* 76

8. Depositions taken under an old commission may be admitted without producing the commission, as it may be presumed to be lost, *aliter*, where under a recent one, the bill and answer need not be produced. *Bayley* and *Alt.* v. *Wylie.* 85

9. Where, by rule of Court, a witness is about to go abroad, is permitted to be examined on interrogatories, they may be given in evidence, if the witness has sailed on the voyage, though he may have been put back into port from bad weather, *Fonsick* v. *Agn.* 92

10. In case against the Sheriff for taking insufficient pledges in replevin, in proof of the insufficiency of the circumstances of them, it is evidence that they were in debt, had been applied to for payment, and promised payment, but did not pay. *Gwyllim* v. *Scholey* and *Alt.* *Page* 100

11. Though an instrument comes out of the possession of the adverse party in consequence of a notice to produce it, if it has been executed in the presence of a subscribing witness, he must be called to prove the execution of it. *Johnson* v. *Lewellin.* 101

12. A person in possession of any paper, who is served with a subpœna, *duces liceu*, is bound to produce it whether the paper belongs to him or not. *Amey* v. *Long.* *Page* 116

13. An agreement entered into by one of the committee on an election shall bind the candidate. *Honeywood* v. Sir *W. Geary.* 119

14. An admission respecting his debt, made by the petitioning creditor, is admissible evidence in an action in which the validity of the commission of bankruptcy comes in question. *Young* and *Barley* v. *Smith* and *Phillips.* 121

15. The conviction of a person before a Justice of the Peace for obstructing officers, in which the evidence given is set out, cannot be given in evidence to contradict what is sworn to by a witness at the trial, as to what he swore before the Justices. The *King* v. *Howe.* 124

16. A person to whom a party, supposing him to be an attorney, makes confidential communications respecting his cause, is bound to give evidence of them, if called as a witness, attorneys only being so privileged as to not being bound to disclose the secrets of their clients. *Fountain,* administrator, v. *Young.* 112

Executor.

1. Where a policy of insurance has been effected on the life of a debtor, as a security to the lender of money, and the lender charges the premium to the account of the debtor, who pays them, if the principal is afterwards paid, the debtor, or his representative, is entitled to the policy. *Holland* v. *Smith.* 11

2. In an action by an executor or administrator for a debt due to the intestate, a creditor of the intestate is a good witness to prove it. *Paull,* administrator of *Sutton,* v. *Brown.* 34

3. If executors, who are by the testator's will to carry on his trade for the benefit of his family, suffer a person to carry on the trade in his own name, such persons may bring actions in his own name for goods sold by him, though afterwards accountable to the executors. *Lister.*

F

Father.

If a daughter of a person performs all the duties of a servant, and all domestic offices in her father's house, though she does not actually sleep in the house, is seduced, the father may support an action, *per quod servitum amisit*. *Munn* v. *Barrett*. *Page* 32

Freight.

1. If a person receives goods from aboard ship, which are shipped to the shipper's order, or his assignees, paying freight with a certain allowance for demurrage, he makes himself, by acceptance of goods, liable to all the terms of the bill of lading, and of course to demurrage. *Dobbin* v. *Thornton*. 6

2. If goods consigned from abroad are delivered to a person, who is in fact not the consignee, if he accepts the goods, he is liable for the freight. *Stogurt* v. *Soptus*. 22

G

Game.

Where a person is convicted under Statute Geo. 3. chap. 80, and a warrant issued to levy the penalty on his goods, the Magistrate may order him verbally to be kept in custody, until a return is made on the warrant *Still* v. *Walls* and *Harris*. 36

Guarantee.

A guarantee by a third person on the sale of goods is within the exception of the stamp acts respecting agreements, and need not be stamped. *Warrington* and *Alt*. v. *Furber* and *Warrington*. 89

Goods sold.

The mere act of striking a balance, for goods sold, of an account between two parties, does not entitle the party, in whose favour the balance is, to interest from that time, unless the money was then to be paid. *Chalie* v. *Duke of York*. 45

Vide *Guarantee* and *Stamp*.

I

Indemnity.

In an action on a promissory note, the holder is not bound to take an indemnity if the note has been lost. *Pearce* v. *Hutchinson*. 124

Indictment.

An indictment for not repairing a road must describe a direct road. *Rex* v. *Great Canfield*. 136

Interest.

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favour the balance is, to interest from that time, unless the money then was to be paid. *Chalie* v. *Duke of York.* 45

2. Where, by a rule of Court, a witness about to go abroad is examined on interrogatories, they may be given in evidence if the witness had sailed on the voyage, though he may have put back into port from bad weather. *Fonsick* v. *Agnd.* 92

Justice of the Peace.

1. Trespass against the Justice of the Peace for taking goods under his warrant, and tenders amends, if the notice of action only claims goods to the value of the same tendered, and it is admitted, the Defendant must have a verdict. *Stringer* v. *Martyr*, Esq. 134

2. If an action is brought against a Justice of the Peace, and notice given under Statute 22 Geo. II. and signed by the attorney for the Plaintiff, describing himself as of London, if in fact he is in Westminster, it is fatal. *Stears* v. *Smith*, Clerk. 138

L

Landlord and Tenant.

1. An agreement for a demise for a year, the rent to be paid weekly, and to have a month's warning if no default was made in payment of the rent, but which agreement the lessor afterwards refuses to execute, and the tenant pays his rent weekly. He is entitled to a month's notice to quit, though the agreement was not executed, and although if a weekly tenant, a week's notice was good. *Doe ex dem. Peacock* v. *Raffan.* Page 4

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4. If a notice to quit is directed to the tenant by a wrong Christian name, and he keeps it, it is a waiver of the misdescription, and the lessor may recover on it, if there was no other tenant of that name. *Doe* v. *Spiller.* 70

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Libel.

An action will not lie for a libel against a Member of a Court-martial, for observing on the conduct of the Prosecutor as malicious and injurious to the service and making that part of the

the sentence acquitting the officer tried by such Court-martial. *Judge* v. Sir *John Moore*. 65

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1. Defendant to a debt, otherwise bound by the Statute of Limitations, admits the debt, but claims to be discharged by a written instrument, but which being referred to, does not amount to a legal discharge, he shall be bound by the admission, and the case be thereby taken out of the Statute? *Partington* v. *Butcher*. 66

N

Negligence.

If a person employs a tradesman to do any work for him, and in the execution of it the tradesman, or his servants, by their negligence, cause an injury to any one, the person employing is liable to the injury arising from such neglect. *Sly* v. *Edgley*. 6

Nisi Prius.

Parol evidence is inadmissible to shew the day on which a trial at *Nisi Prius* takes place. *Thomas* v. *Astley* and *Smith*. 80

Notice to quit.

1. Notice to quit addressed to the tenant by wrong Christian name, and he keeps it, it is a matter of the misdescription, and the lessor may recover on it if there was no other tenant of that name. *Doe* v. *Spiller*. 70

2. A notice given on the 26th of September to quit at the end of six calendar months, is good to determine a holding, commencing on the 25th of March. *Howard* v. *Wemsley*. 58

P

Parish.

1. When the father of a bastard child, upon whom an order of filiation had been made, paid several sums on that account to the parish, and during all that time for which he paid the child had been in the Foundling Hospital, and the parish put to no expence, he may recover it back. *Hodgson* v. *Wilkins*. 98

2. If parishes are united for parochial purposes, if an indictment is brought it must be laid in the parish where it was really situated. *Goodtitle* on dem. *Pinsent* v. *Lammimoor*. 98

Partner.

Where three persons undertake to accept bills for a particular concern, and he draws bills on account of one of them only, and not for the particular concern, and he accepts in the name of the three, such bill cannot be recovered by a *bona fide* holder, who received it from the drawer against the other two. *Williams* v. *Thomas Humby* and others. 18

Payment.

If a Defendant, being sued, pays the Plaintiff, after the writ is sued out, the money without discharging the costs, the attorney may proceed in the cause notwithstanding. *Toms* v. *Powell.* 40

Pleading.

Whenever a general issue is pleaded, though with a tender in the plea, or with different pleas, Defendant having given notice of set-off may give evidence accordingly. *Coulson* v. *Jones* 50

Policy of Insurance.

1. An affidavit of an agent cannot be used to prove a fact against his principal, where he himself can be called; but where the principal has used the affidavit of an agent for the purpose of an application to the Court, in which a particular fact is stated, the affidavit of the agent may be used as evidence of that fact. *Johnson* v. *Ward.* 47

It is sufficient in effecting a policy of insurance for the assured to communicate to the underwriter the then state of the ship, nor is the withholding from him letters containing an account of former misfortunes, which may have happened to the ship or crew, such a concealment of circumstances as shall avoid the policy. *Freeland* v. *Glover.* 14

Depositions taken in an action on a policy of insurance of the captain, who is part owner, where the loss is imputed to his neglect, are not evidence. *Taylor* v. *M'Vicar.* 27

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5. Under a policy on a ship for a given time, while securely moored in a certain harbour, she is warranted in changing her mooring within the same harbour. —— v. *Westmore.* 109

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See *Sheriff.*

R

Replevin.

1. In replevin where a tender is pleaded, and a subsequent demand and refusal replied, the demand must be made by, and the refusal be to the Defendant, if so made by the sent or authorised by him, the evidence does not support the issue. *Pimm* v. *Grevill.* 92

2. In case against the Sheriff for taking insufficient pledges in replevin, in proof of the insufficiency of the circumstances of them, it is evidence that they were in debt, they being applied to

to for payment, had promised payment, but did not pay. *Gwyllim* v. *Scholey* and *Alt.* *Page* 100

Road.

An indictment for not repairing a road must describe a direct road. *Rex* v. *Great Canfield.* 136

Sailor.

1. Where a seaman has been impressed, and so would be entitled to wages for the time he had served under Stat 2 Geo. 2. that claim must, however, depend on the completion of the voyage, for if the vessel is lost, as the rest of the crew thereby forfeit their claim to wages, the impressed seaman equally forfeits his claim for wages to the time of his being impressed. *Dunkley* v. *Bulwer* and *Lloyd* 86
2. A promise made by the master of a vessel of an advance of wages to a sailor for extra work during the voyage is void. *Still* v. *Meyrick.* 128

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If a daughter of a person performs all the duties of a servant, and all domestic offices in her father's house, though she does not actually sleep in the house, the father may support an action *per quod servitium amisit.* *Manns* v. *Barratt.* 32

Set-off.

1. Where parties, having cross demands, settle and balance their accounts, though part of the Plaintiff's demand was for that which no action could be supported, the settlement of the accounts shall bind the Defendant, so that he cannot set up that defence to an action for the balance. *Dawson* v. *Remnant.* *Page* 24
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2. The Sheriff is entitled to his poundage on an execution levied, though that execution is afterwards set aside for irregularity. *Bullen* v. *Ansley* and *Smith*, Sheriffs of London. 111

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If goods consigned from abroad are delivered to a person, who in fact is not the consignee, if he

he accepts the goods, he is liable for the freight. *Secgart* v. *Scott.* 22

Vide *Sailor.*

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See *Negligence.*

Stamp.

A guarantee by a third person on the sale of goods is within the exception of the stamp act, and need not be stamped. *Warrington* and *Alt.* v. *Furber* and *Warrington.* 89

Subpœna duces liceu Officie.

A person in possession of any paper, who is served with a subpœna, *duces liceu*, is bound to produce it, whether the paper belongs to him or not. *Amey* v. *Long.* 116

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What is a legal tender. *Holland* v. *Phillips.* 46

Tithes.

1. Whenever a general issue is pleaded, though with a tender in the plea, or with different pleas, Defendant having given notice of set-off, may give evidence accordingly. *Coulson* v. *Jones.* 50
2. Where there is a private road through a farm, a parson may use it for carrying away his tithes, though there is another public road equally convenient. *Cobb*, Clerk, v. *Selby.* 103
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Trade.

1. A person carrying on trade as a trustee only, for children only, is not liable to the penalty of the Statute for carrying on a trade without serving an apprenticeship. *Meazcan* v. *Pearsall.* 1
2. The trade of a coachmaker is not within the Stat. 5 Eliz. *Pride* v. *Stubbs.* 131

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A person carrying on a trade as a trustee for children only, is not liable to the penalty of the Statute for carrying a trade without serving an apprenticeship. *Meazcan* v. *Pearsall.* 1

U

Usage.

If a bill is accepted, the person taking the bill does it under all the terms of acceptance, and therefore

therefore if made payable at a banker's, it must be demanded within banking hours. *Parker* v. *Gordon.* 41

Vestry.

Where an action is defended by an order of Vestry, and the expences ordered to be defrayed out of the poors' rates, which cannot legally be done; a parishioner, who only meant to submit to pay the rate, and not otherwise to contribute, is a good witness. *Yates* v. *Lance.* 132

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